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ESSENTIALS

of

THE LAW OF DAMAGES

BY

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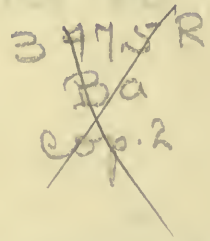

TO THE MEMORY OF

My Father

and to

My Mother

PREFACE

The purpose of this book is to state clearly the rules of the law of Damages, to comment upon and illustrate the workings of the rules, and to present important recent developments in this field. An effort is made to cultivate in the student an independent judgment as to the correctness of statements of principle. For this purpose, comparisons of adverse holdings are made, and questionable holdings are questioned or criticized. It is not intended that this work contain any extended treatment of the law of tort and contract. Questions of liability are so interwoven with questions as to the measure of damages that it is necessary to devote small portions of the book to treatment of the primary question of the defendant's liability, as is done in all books on this subject. In determining the amount of space to be given to each portion of the general subject, regard has been had to the relative importance of the parts and to their complexity and difficulty.

The citations of cases and quotations from them and other authorities have been selected from a large mass of material gathered from almost every possible source during the years in which the writer has written articles upon and taught this subject. Many of the cases quoted, cited, or used as illustrations, are leading cases, and to these have been added such other cases as seem valuable for purposes of instruction. In the selection of cases for illustrative purposes, the element of human interest has never been lost sight of; for the student must be interested while instructed. A considerable number of the

cases referred to are very recent, bringing the book well to date. For the convenience of the student in any kind of law school, as well as for practitioners with limited library facilities, the case references are given to all series of reports.

The book is planned with a view to the needs of two types of students: first, the student in a law school using the text book method; second, the student in a law school pursuing the case method. The case illustrations and the footnotes abound in quotations from decisions, giving the student in a text book school an advantage usually only that of the student in a case school,—the advantage of seeing the manner in which a court has actually expressed itself in regard to the principle being studied and the manner in which a court applies the principle to facts. The writer, having been both a student and a teacher of this subject by the case method, feels that the case student who has no text book whatever is handicapped, unless he be directed by a very unusual teacher and have a phenomenal ability to take notes of lectures. The student's work is likely to fail to constitute for him an organic whole at the termination of his course, if he has been taught by means of cases and lectures only. Such a book as this, placed in his hands for independent use outside of class hours, should present a summary such as will aid him in grasping the relation of principle to principle and of case to case and of principle to case. Among the cases summarized in illustrations, cited in support of the text, or quoted in text or footnotes, are a great many of the cases found in the principal case books.

It is believed also that this book will constitute as satisfactory a help to the practitioner as will any one-volume work.

The writer wishes gratefully to acknowledge the assistance of his former colleague, Professor H. W. Arant, of Emory University, former chairman of the editorial board of the Yale Law Journal, who has examined the chapter

on Cause and Result, and also the encouragement given him in this work by his former colleague, Dean R. A. Rasco, of John B. Stetson University. In the manuscript as it stood until recently, no general treatment of the measure of damages for anticipatory breach of contract was attempted, only specific applications of the rules involved in such measure appearing in different parts of the work; and the writer thankfully acknowledges that the presence of the section on this subject, which, it is believed, will prove useful, is due to a suggestion by Dean Henry W. Ballantine, of the University of Illinois. Invaluable suggestions by Mr. James C. Cahill, managing editor of the publishers, and by Mr. Edward F. Donovan, formerly a student of the writer, formerly of the staff of the Standard Dictionary and the Literary Digest, and now with the Edward Thompson Company, have been gladly and gratefully followed. Further, the writer acknowledges the encouragement and very substantial aid given by his wife.

The excellent libraries of three law schools, the Georgia State Library, and one private library have been used at various times in the preparation of this work. Practically everything of any possible bearing on the subject has been available. Special acknowledgment is due the kindness of the Honorable J. C. Otts, of the bar of Spartanburg, South Carolina, who opened his large private library to the writer during the long sojourn of the latter near his city.

R. S. B.

Champaign, Illinois, July, 1919.

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CHAPTER I

Introduction

1. **"Damage" and "Damages."**—Damage is loss or harm. *Damages,* the plural of damage, is, rather unfortunately, used in two senses: first, as the mere plural of damage; and second, as meaning compensation claimed or awarded in a judicial proceeding for damage or for the invasion of a legal right.[1] In the study of this subject, the use of the word "damages" in the first of these two senses should, as far as possible, be avoided, in order to obviate difficulties arising from ambiguity of expression.

Damages may be grounded either in a legal injury from which no damage has resulted, in which case they are known as nominal damages and amount to only a nominal sum such as six cents; or they may be grounded in damage resulting from such a legal injury or in damage resulting from what becomes a legal injury only when

1—Damages, a sum of money claimed or adjudged in compensation for loss or injury.—Oxford Dictionary.

"'Damages,' briefly defined, means compensation for the legal injury. It is a word easy to define, but often exceedingly difficult of application."—Jemo v. Tourist Hotel Co., (1909) 55 Wash. 595, 104 Pac. 820, 19 Ann. Cas. 1199.

accompanied by damage. A trespasses on B's land, doing no harm. B can recover nominal damages in vindication of his legal right. A trespasses upon B's land, destroying B's trees. B can recover compensatory damages for his loss. A so conducts his fertilizer works as to do serious damage to B in the occupation and enjoyment of his home, odors and gases from A's works invading B's property. B can recover compensatory damages for his loss. In the latter case, no right of action would have accrued to B if he had not been damaged by the acts of A, for a nuisance gives no right of action if not resulting in damage to the plaintiff. Likewise, negligence ripens into an actionable injury only when resulting in damage.

The great outstanding rules of the law of damages, to be discussed at length hereafter, are: first, that, in order to constitute a recoverable element of damage, a loss or injury must be a proximate result of the defendant's wrong; and second, that the nature of the plaintiff's damage and its proximate connection with the defendant's wrong, must be shown with a reasonable degree of certainty.

Some elements of loss for which damages are assessed are pecuniary, as in the case of a deprivation of money or a thing having money value. Other elements, such as physical and mental suffering, are non-pecuniary.

As will be observed in subsequent portions of this work, the court today exercises considerable control over the amount of damages assessed, setting aside a verdict for a sum so large as to evince passion and prejudice on the part of the jury. Such a control, even today, it is universally admitted, should be exercised with extreme caution. There is, however, a historical reason why the finding of a jury as to damages was once more binding upon the court than it now is. In the days of the early common law, the jury was composed of men who were supposed to know the facts in the case. Jurors were witnesses.

Today, as is well known, the situation is altogether different. In contract, and as to pecuniary elements of damage in tort, the court can, and does, exercise rather a close control over the amount of damages; but, as to non-pecuniary elements of damage in torts, the jury may exercise a discretion of considerable breadth, for it is, as to such elements, exceedingly difficult, in most cases, to say that a verdict is excessive or inadequate, and it is altogether impossible to lay down practically complete general rules as in contract.

2. **Money Standard by Which Damages Are Measured.** —Damages are measured in such money as is legal tender in the country at the time of the rendition of the verdict. A verdict assessing damages at a certain amount "in United States gold coin" is bad, unless it be in an action based upon an express or implied promise to pay in such coin. It is improper that the verdict should thus single out one of the kinds of legal tender, in the absence of a stipulation to this effect by the parties.[2]

2—Finger v. Diel, (1875) 1 Calif. Unreported Cases, 889.

CHAPTER II

Damnum Absque Injuria

3. **In General.**—Of the myriads of losses suffered daily, comparatively few are such as to give any right of action against any person. A, through his own awkwardness, falls and breaks some bones. B, having bad business judgment, enters into a contract through which he loses money. C's house is struck by lightning. D's business is diminished by the honest and legal competition of X. E willingly consents to the perpetration of a wrong upon him by Y. Each of these persons has suffered a loss or *damnum,* but not one of them has a right of action. Not even nominal damages can be recovered against anybody in any of these cases, for no one has committed an *injuria* or legal wrong.

Right here it is essential that the student notice the legal use of the word *injuria.* It does not mean "injury" in the ordinary popular sense, but it means legal injustice, just as it does in Latin writings. The English word *injury* is often used with the same legal meaning. A maxim bringing out forcefully this meaning is, *"Volenti non fit injuria."* ("To one who is willing, a legal injustice is not done.") It could not be contended that one who is willing suffers no injury in the popular sense, but it is perfectly clear that he has not suffered a legal injustice for which he can maintain an action.[1]

4. **Some Instances of Damnum Absque Injuria.**—A very common instance of *damnum absque injuria* is the

1—See Pasley v. Freeman, (1789) 3 T. R. 51, 100 Eng. Repr. 450, 12 E. R. C. 235; and Howland v. Vincent, (1845) 10 Metc. (Mass.) 371, 43 Am. Dec. 442.

privileged communication of statements which, if not privileged, would be slanderous or libelous. The fact that a derogatory statement happens to be communicated between persons whose relations are such as to make it privileged, may not lessen the actual damage done; but the fact of privilege prevents the utterance from being an actionable wrong.

One who reports to a street car company the misconduct of its conductor, even though prompted by ill-will and resentment, is not liable, as he has done the conductor no legal wrong.[2]

One land owner may use and improve his land for the purpose for which similar land is ordinarily used, and may do what is necessary for that purpose, building upon it or raising or lowering its surface, although the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water back over land on which it would otherwise not go.[3]

Public street improvements reasonably made by a city, as in raising or lowering a grade, may cause inconvenience and loss to an adjoining owner, without giving him a right of action.[4]

Where defendant city bought a lot adjoining that of plaintiff and opened a street through the lot purchased, making plaintiff's lot bounded on three sides by public streets, rendering it ungainly and unsightly to the public, and depriving it of privacy, this is mere *damnum absque injuria*.[5]

2—Lancaster v. Hamburger, (1904) 70 O. St. 156, 71 N. E. 289, 1 Ann. Cas. 248, 65 L. R. A. 856.

3—The above text is quoted almost verbatim from Jordan v. St. Paul, M. & M. R. Co., (1889) 42 Minn. 172, 43 N. W. 849, 6 L. R. A. 573.

4—Reardon v. San Francisco, (1885) 66 Calif. 492, 6 Pac. 317, 56 Am. Rep. 109; Denver v. Bayer, (1883) 7 Colo. 113, 2 Pac. 6.

5—Peel v. Atlanta, (1890) 85

Logs are driven down a stream, and, without any negligence of the person driving them, are deposited upon the property of a riparian owner. The latter has no action, this being a case of *damnum absque injuria.*[6]

CASE ILLUSTRATIONS

1. A obstructed the light of B, his neighbor, by erecting on his own land a fence twenty feet high, opposite B's windows. In so doing, A did not interfere with any legal right of B. Therefore, B, though damaged, cannot maintain an action.[7]

2. Defendant made an excavation on his own land, near a street, violating no law in doing so. Plaintiff, passing on the street in the dark, stepped over the street line, fell into the excavation, and was injured. Plaintiff cannot recover, as it is a case *damnum absque injuria.*[8]

Ga. 138, 11 S. E. 582, 8 L. R. A. 787.

6—Carter v. Thurston, (1877) 58 N. H. 104, 42 Am. Rep. 584; Hot Springs Lumber & Mfg. Co. v. Revercomb, (1906) 106 Va. 176, 55 S. E. 580, 9 L. R. A. (N. S.) 894; Boutwell v. Champlain Realty Co., (1915) 89 Vt. 80, 94 Atl. 108, Ann. Cas. 1918 A 726.

"Floating logs may cause damage to the estate of the riparian owner; but, if the owner of the logs uses due care and skill in driving them, he is not liable for such damage. Land on navigable streams is subject to the danger incident to the right of navigation; and, where logs are driven in a stream in an ordinarily careful, prudent manner, the owner is not liable for damages which may result to the riparian owner."—Field v. Apple River Log-Driving Co., (1887) 67 Wis. 569, 31 N. W. 17.

"So it was said that, if a man be driving cattle through a town, and one of them goes into another man's house, and he follows him, trespass does not lie for this."—Holmes, The Common Law, p. 118, citing Popham, p. 162, and other authorities.

Accord: Hartford v. Brady, (1874) 114 Mass. 466, 19 Am. Rep. 377.

7—Mahan v. Brown, (1835) 13 Wend. (N. Y.) 261, 28 Am. Dec. 461.

8—Howland v. Vincent, (1845) 10 Metc. (Mass.) 371, 43 Am. Dec. 442.

CHAPTER III

Limitation of Recovery to Plaintiff's Interest

5. **Limitation of Plaintiff's Interest a Question Arising Usually in Tort.**—In contract, the limitation of the plaintiff's recovery by the nature or extent of his interest does not ordinarily arise; for it is not usually according to the agreement of the parties that rights under the contract shall be carved into pieces and assigned piecemeal. Where a contract is broken, the offended party can ordinarily recover all the damages that are recoverable by any person for the breach.

In tort, however, the defendant's wrong may have affected numerous interests of numerous persons; and nice questions arise regarding the effect of the limits of a plaintiff's right upon the measure of damages to be allowed.

6. **How Plaintiff's Recovery Is Limited by His Interest.**—Where an action in regard to conversion of or injury to property is between a defendant having legal title and a plaintiff having a more limited interest, the latter can, of course, recover no more than the value of his own interest. Such cases are actions by a pledgee against a pledgor for interfering with the pledge, actions by a vendee on credit for conversion against his vendor who has been paid a part of the purchase-price, and actions by a tenant against his landlord for wrongful eviction.[1] It would be absurd to contend that a pledgor

1—In trover, where defendant holds a lien on the property to a certain amount, that amount is deducted by the jury in assessing damages. Fowler v. Gilman, (1847) 13 Metc. (Mass.) 267.

could recover the entire value of the thing pledged, when his interest amounts simply to the difference between the value of the pledge and the amount for which it is pledged; and it would be equally absurd to say that a tenant for one year could recover from his landlord compensatory damages in a sum greater than the value of his term, if the landlord wrongfully evicts him, in the absence of proximate consequential damage. All of this is easy to see.

A greater difficulty comes in the cases wherein the plaintiff, a person having a limited interest in the property in question, sues the defendant, a stranger, for tortious injury to or conversion of the property. Sometimes the interests of different persons in the property are sufficiently distinct to enable one to say readily for what elements of damage each person in interest may recover. For an injury affecting his use of land during his term, a tenant may recover for the damage done to his interest; and, if the same injury affects the landlord's reversion in the land, he can recover damages to the extent of the injury done to his reversion.[2] If the proof does not show more than that plaintiff is a bare occupant of land upon which a trespass has been committed, or that he has only a three-fourths interest in the premises, an instruction permitting him to recover for the entire damage to the land, is inaccurate.[3] But the fact that plaintiff has given a mere executory and revocable license to cut and remove timber from his land, does not prevent him from getting damages for injury to the trees on the land.[4]

A mere finder sues for the conversion of the object he has found. He has a right to the possession of the found article against the entire world, except the true owner,

2—Seely v. Alden, (1869) 61 Pa. St. 302, 100 Am. Dec. 642.

3—Sweeney v. Connaughton, (1901) 100 Ill. App. 79.

4—Clarke v. New York, N. H. & H. R. Co., (1904) 26 R. I. 59, 58 Atl. 245.

and so he may maintain trover and get the entire value of the article,[5] which, of course, does not free him of the obligation to return the article to the true owner, if he is later ascertained. Where crops owned by the tenant or mortgagor of land are converted, the right of action is exclusively in such tenant or mortgagor.[6] For an injury to realty, a reversioner may recover damages to the extent of the diminution in value of his reversion,[7] and a life tenant may, according to the better view, recover only for the diminution in value of his estate.[8] But some courts hold that a life tenant may recover damages for any injury, to the extent of the damage inflicted upon the life estate and a remainder or reversion, where the injury is permanent. It seems, however, where this view is taken, that the life tenant is under a legal obligation to pay over to the reversioner or remainder man an amount sufficient to compensate for the loss of the latter.[9]

A life tenant of personalty can, in trover, get damages for injury to his interest only, and not damages in the total amount of the value of the property.[10]

When fixtures are removed or other injury done to mortgaged realty, it is obvious that damage is suffered

5—Armory v. Delamirie, (1721) 1 Strange 505, 93 Eng. Repr. 664.

6—Woodward v. Pickett, (1857) 8 Gray (Mass.) 617; Page v. Robinson, (1852) 10 Cush. (Mass.) 99.

7—Lowery v. Rowland, (1893) 104 Ala. 420, 16 So. 88; Jordan v. Benwood, (1896) 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

8—"In determining the value of a life estate the common law rule of valuing the life estate at one third and the remainder at two thirds of the capital sum would appear to be followed in some jurisdictions, but the modern tendency is to compute the value on the basis of the annual rental or income value multiplied by the number of years based on the expectation of life of the life tenant as determined largely from the mortality tables."—17 R. C. L. 644, citing: Grove v. Youell, (1896) 110 Mich. 285, 68 N. W. 132, 33 L. R. A. 297; and Jordan v. Benwood, supra. See Greer v. New York, (1865) 1 Abb. Prac. (N. S.) 206, 27 N. Y. Super. Ct. 675.

9—See Rockwood v. Robinson, (1893) 159 Mass. 406, 34 N. E. 521.

10—Russell v. Kearney, (1859) 27 Ga. 96.

by both mortgagor in possession and mortgagee. The mortgagor in possession suffers a loss of the present use of the fixtures wrongfully removed or a diminution in the value of the use of the property, plus an injury to the future complete ownership if he redeems; and the mortgagee suffers a diminution in value of his security to the extent of the value of the fixtures, and, in a state in which a mortgage transfers legal title to the mortgagee, the loss to the mortgagee is a diminution in value of property to which he actually holds legal title and so may be sued for directly by the mortgagee.[11] It has been held that this applies, not only to first, but to second or third mortgagees;[12] but the very reason for this rule as to a first mortgagee would seem to defeat it as to those who are subsequent.[13] The first mortgagee is allowed to recover only because he has legal title;[14] and, if he has it, no one else can have it at the same time. Second and subsequent mortgagees are mere lienholders, and they cannot be damaged either actually or technically by injury to the realty, to any greater extent than mere impairment of security, so that it would seem that this should be the extent of the recovery of any such mortgagee. In states wherein even a first mortgagee has only a lien, it would seem difficult, on principle, to say that a mortgagee's right of action for an injury to realty gives him a right to damages any more than sufficient to compensate him for the impairment of his security; and so, in jurisdictions adhering to the equitable lien theory of the real estate mortgage, the mortgagee, whether he be a first or a subsequent mortgagee, it would seem, can recover for only the impairment of the value of his lien.[15] In a state in which the

11—Gooding v. Shea, (1869) 103 Mass. 360, 4 Am. Rep. 563.

12—Gooding v. Shea, supra.

13—Turrell v. Jackson, (1877) 39 N. J. Law 329. See Martin v. Franklin Fire Insurance Co., (1875) 38 N. J. Law 140.

14—Gooding v. Shea, supra.

15—"A mortgagee out of possession or having no right of possession of the mortgaged property can maintain no form of action in which the right to recover for a tort committed on or to such prop-

mortgagee holds legal title, the right of action of the mortgagor, of course, is based upon his present possession or right of present possession;[16] and, in a state where legal title remains in the mortgagor, the right of action of the mortgagor is grounded in both legal title and the present right of possession.

A somewhat complicated question is how far the satisfaction made to one of a number of holders of interests in the same subject-matter will discharge the claims of the others. Superiority of right of the parties in interest determines. The due satisfaction of the claim that is prior to all of the others will discharge all the claims. But the mere existence of a claim prior to that of the plaintiff does not bar the plaintiff's claim. It is no defence to a suit by a mortgagor against a tortfeasor to say that the mortgagee has a superior right of action, without saying that such right of action has been satisfied, or that a demand has been made by the party having a prior interest, or that the defendant has been authorized by such party in interest to resist plaintiff's claim for his benefit. Neither is it a defence to plead that a person having an inferior right to that of plaintiff has brought an action.[17]

"A bailee who is answerable over to the bailor for safe keeping, is entitled to recover the value of the property bailed against a stranger."[18]

The holder of a lien against personalty can, in the event of its wrongful taking, procure damages to the extent of the value of his lien.[19] Where the plaintiff is merely a holder of executions to which certain goods are subject, a wrongful taker of the goods cannot be made to respond in damages to the entire amount of the value of the goods,

erty is dependent upon possession or the right of possession, such as trespass, trover, or replevin."—20 Am. & Eng. Encyc. of Law 1016.

16—Gooding v. Shea, supra.

17—On these phases of the subject, see the discussion in Gooding v. Shea, supra.

18—Caswell v. Howard, (1835) 33 Mass. (16 Pick.) 562.

19—Outcalt v. Durling, (1856) 25 N. J. Law 443.

but only to the amount of the executions, if such amount happen to be less than the value.[20] It has been held that a mortgagor in possession can maintain an action for injury to the mortgaged real estate and may recover for the whole injury; but he recovers for his own benefit only such an amount as will compensate him for the damage to his own interest, and what he recovers in excess of this is for the benefit of the mortgagee.[21]

If the plaintiff has actually contracted to sell goods in a certain place where they are to be delivered at a specified price, and the goods are wrongfully destroyed in transit, the plaintiff's measure of damages is the price at which the goods are contracted to be sold. His interest in the goods really amounts to the right to get the contract price for them.[22]

CASE ILLUSTRATIONS

1. A mortgagor cut and carried away timber trees standing on the mortgaged premises. Held that, after condition broken, the mortgagee, although not in actual possession, may maintain trespass against the mortgagor and recover for the injury to the freehold.[23]

2. X executes a chattel mortgage on machinery to Y and Z. An officer takes possession of part of the machinery under an attachment issued against A and B, who held legal title under a prior unsatisfied mortgage, but had not taken possession. Held that Y may recover of the officer, in trespass and trover, the full value of the property taken. "The plaintiff was in possession of the property. He had an interest in it, acquired by his mortgage deed. He is, therefore, entitled to the possession, and to the property also, against all the world but the real owner. The defendant was a mere stranger. * * * If the writ is against

20—Spoor v. Holland, (1832) 8 Wend. (N. Y.) 445, 24 Am. Dec. 37.

21—Gooding v. Shea, supra.

22—Tompkins v. Kanawha Board, (1882) 21 W. Va. 224.

23—Page v. Robinson, (1852) 10 Cush. (Mass.) 99.

a stranger, then, he recovers the value of the property and interest, according to the general rule; and holds the balance beyond his own interest, in trust for the general owner." [24]

24—White v. Webb, (1842) 15 Conn. 302.

CHAPTER IV

Cause and Result

7. **In General.**—From the beginning of history, courts trying civil causes have been troubled with the question what consequences of a wrongful act entitle the wronged person to compensation from the wrongdoer. Putting the matter another way, the question in each case is, "Is the defendant's wrong, legally considered, the cause of the injury to the plaintiff or of a particular element of damage under consideration?" or "Can a jury, on the evidence, rightly bring in a verdict based upon a conclusion that defendant's wrong is the legal cause of the injury to plaintiff or of such element of damages as is in question?" The question is often determined by a decision whether, on the evidence, the trial judge was warranted in saying, as a matter of law, that defendant's wrong was not a proximate cause of the injury complained of.

It is clear that not all ultimate effects of all acts are compensated for by law. A rightfully calls upon B, innocently causing B to forget that he has an important business appointment. B, through failure to keep the appointment, fails to make a profit of $5,000 on a deal which he would have made but for A's interruption. Certainly, A cannot be held liable for B's loss; and, in order to arrive at such a conclusion, it is not necessary or even proper to consider legal rules as to cause and result. What A did was entirely lawful, there being neither wilful tort nor negligence nor breach of contract. In such a case, there is simply no cause of action whatever, and so it is only confusing to give undue weight to the question what, on such a state of facts, is the legal relation of causes and effects.

Where A lends a pistol to B, who accidentally injures C, the injury is only a remote result of A's act, which, it may be noted, is not a wrongful act, so that an action against A is not based upon a wrong at all and so must fail, not only for lack of causal connection with A's act, but also for lack of any basis on which to begin an action at all.[1]

Nor is a defendant liable for all effects even of a wrongful act. In some cases, the defendant has actually been negligent, but may or may not have proximately caused, by his negligence, the damage complained of. In such a case, as damage is the gist of the action in all negligence cases, the entire action succeeds or fails, according to the solution of the question by the jury, under proper instructions, whether the defendant's negligence is the proximate cause of the plaintiff's damage, so as to afford a right to damages.

In another case, the defendant has clearly committed a legal injury to the plaintiff, such injury being followed by elements of damage to the plaintiff, which elements we will designate as "1," "2," "3," and "4." Perhaps elements "1" and "3" are unquestionably proximate results of defendant's wrongful act, but there is a difficult question whether elements "2" and "4," if caused at all by such act, are proximate results of defendant's wrong, i. e. such elements of damage as defendant must make compensation for under the law.

Where plaintiff's half carload of staves was piled upon defendant's right of way for shipment, and defendant negligently burned them, plaintiff can recover only for the staves destroyed, and cannot recover an additional amount to compensate him for loss by reason of the fact that he cannot market his half carload remaining, this loss being too remote.[2]

1—Penny v. Atlantic Coast Line R. Co., (1910) 153 N. Car. 296, 69 S. E. 238, 32 L. R. A. (N. S.) 1209.

2—Yazoo & M. V. R. Co. v. Cox, (1917) 114 Miss. 49, 74 So. 779.

8. **Direct and Consequential Damages.**—Damages are divided into two classes,—direct and consequential. Direct damages are assessed in compensation for injuries that are immediately and closely connected with defendant's wrong. The causal connection, being short and direct, is easier to establish than in cases where the injurious result is not immediate. In a suit for assault and battery, it appears that plaintiff's eyes were injured by a blow from the defendant. The injury to plaintiff's eyes was direct damage. One person converts another's horse. The loss of the horse to the owner is an immediate result of the conversion; and the damages assessed against the convertor for the loss of the horse, would be called direct damages. Damages for immediate and direct results are so obviously recoverable, that the field of direct damages gives little trouble as to legal principles. Direct damages can always be recovered, if plaintiff states and proves a cause of action in which direct or immediate damage is included at all.[3]

Consequential damages include all damages assessed for injuries that are not direct or immediate. Not all consequential damage, however, may be recovered for. The mere fact that certain damage is consequent upon a certain legal wrong, does not give the plaintiff a right to recover for such damage.[4] Only such consequential damage as is proximate may be recovered for. Consequential damages are usually to be recovered only upon being specially pleaded. Because such damages are

3—See Vosburg v. Putney, (1890) 78 Wis. 85, 80 Wis. 523, 47 N. W. 99, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47; Blake v. Lord, (1860) 16 Gray (Mass.) 387; and Marsh v. McPherson, (1881) 105 U. S. 709, 26 L. ed. 1139. See also article by the writer, "Confusion of the Terms 'Proximate' and 'Direct,'" 86 Central Law Journal 224.

4—Pennsylvania R. Co. v. Wabash, etc., R. Co., (1895) 157 U. S. 225, 15 Sup. Ct. 576, 39 L. ed. 682; Lewis v. Flint & Pere Marquette Ry. Co., (1884) 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790; Dubuque Wood & Coal Association v. Dubuque, (1870) 30 Ia. 176.

claimed for an injury that is not direct and that is not such as always necessarily occurs as a result of the wrong set up, the defendant is usually held to be entitled to be informed, by means of the plaintiff's specially pleading it, of the result for which he claims consequential damages.

9. **Proximate and Remote Damages.**—As all damages are classified as direct and consequential, so are they all divided into two other classes, marked off from each other along another line,—proximate and remote. All direct damage being proximate, in any case wherein the damage is direct, as in the case of the smashing of A's nose by B in an ordinary instance of assault and battery, there is no opportunity to dispute the fact that the damage is proximate to the wrong. In such a case of assault and battery, the injury to A's nose is a direct result of the battery by B; and, as all direct results are proximate, it is also a proximate result and therefore a recoverable element of damage. It is in a case of consequential damage that the question of proximity becomes important and frequently all-determining as to the entire case. As has been said, there can be no question as to the proximity of any direct result; but consequential damage may or may not be proximate. Many of the consequential results of a wrong are so remote as not to be the basis of an assessment of damages.

It is one of the most important legal rules, that only proximate results of defendant's wrong can constitute a basis of recovery of damages. A proximate result is such a result as is not separated from defendant's wrongful act by any independent, efficient, intervening, causal event that has broken the causal connection between such act and such result.[5] Mere lapse of time or intervention of

5—"The rule limiting the recovery of damage to 'the natural and proximate consequence of the act complained of' is universally admitted, and the extreme difficulty in its practical application is

space does not prevent the result from being proximate. Most decisions, both in contract and in tort, however, require that, in order to be proximate, so as to give a right to damages, a result must also be natural and probable; i. e., that the result must have been such as should have been contemplated as a probable result by the wrongdoer as a reasonable man. "Natural," as here used, seems to mean "normal."[6] As a wrong which is a proximate cause of the plaintiff's injury is the only kind of cause regarded in law as giving a right of recovery of substantial damages, the term "legal cause" is sometimes used synonymously with "proximate cause."

Plaintiff's entire damage, or any item thereof, is too remote to allow of recovery, if it is separated from the defendant's wrongful act by an independent, efficient cause which breaks the causal connection; or, according to most cases,—especially if the action is based upon negligence or contract,—if it is not a natural and probable result.

quite as widely conceded. The difficulty results not from any defect in the rule, but in applying a principle, stated in such general language, to cases of diverse facts. The dividing line between proximate and remote damages is so indistinct, if not often quite invisible, that there is, on either side, a vast field of doubtful and disputed ground. In exploring this ground there is to be had but little aid from the light of adjudicated cases. The course followed in each case, which is declared to be upon one side or the other of the dividing line, is plainly marked out, but no undisputed landmarks are established by which the dividing line itself may be precisely traced. As so little aid is derived from precedents in arriving at the conclusion we have reached, it would prove quite useless to refer to them. Damage to be recoverable must be the proximate consequence of the act complained of; that is, it must be the consequence that follows the act, and not the secondary result from the first consequence, either alone or in combination with other circumstances." —Dubuque Wood & Coal Association v. Dubuque, (1870) 30 Ia. 176.

6—"The expression, the 'natural' consequence, * * * by no means conveys to the mind an adequate notion of what is meant; 'probable' would perhaps be a better expression."—Grove, J., in Sharp v. Powell, (1872) L. R. 7 C. P. 253.

10. **Causation in Contract.**—As a contract right is based entirely upon an agreement of the parties, in contract cases, damages only for such losses as were within the contemplation of the parties, at the time of making the agreement, as natural and probable consequences of a breach of the contract, may be recovered.[7] In contract, as in tort, in order to be recoverable, the damage must be a proximate result of the defendant's wrong;[8] but, in contract, the question of proximate cause arises less frequently than does the question of the intention of the parties as to liability for different elements of damage. In negligence cases, there is no right of action whatever, unless defendant's negligence is shown to have been a proximate cause of plaintiff's injury; but, in contract cases, proof of the contract and its breach establishes a right of action, just as, in a trespass case, proof of the trespass establishes the plaintiff's right to maintain his action. Having, however, passed the threshold of the action, we usually have the question raised: "What items of the damage suffered by the plaintiff, consequent upon the breach of the contract, can be regarded as having been within the contemplation of the parties at the time they entered the contractual relation?" To put the question another way, as regards each item of damage, we must ask: "Did the parties, at the time of making the contract, contemplate this item of damage as a natural and probable consequence of a breach?" The interpretation of the contract, as to this point, as in regard to other matters, is for the court.

Where there is delay in the construction of a ship, so that it starts across the sea at a later time than was intended, and is caught in a hurricane and destroyed, the

7—Hadley v. Baxendale, (1854) 9 Exch. 341, 5 E. R. C. 502; Primrose v. Western Union Tel. Co., (1894) 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. ed. 883.

8—Booth v. Spuyten Duyvil Rolling Mill Co., (1875) 60 N. Y. 487.

loss of the vessel is held to be a remote and unexpected consequence of the delay in construction;[9] and so, where a carrier delays in the forwarding of baggage, its delay is not the proximate cause of its being burned in transit.[10]

In many cases, it happens that even the written contract of the parties is not absolutely conclusive as to what elements of damage they contemplated as being natural and probable, there being proved external facts which show, without contradiction of any of the terms of the written contract, that the particular item of damage in question was or was not in the contemplation of the parties as being a natural and probable result of a breach.[11] The finding of these facts is for the jury, under proper instructions from the court.

The contractor is always liable for the direct result of the breach of his contract, which is the loss of the value of the contract to the other party.[12] Consequential damage, such as loss of profits which the plaintiff had expected to make and certainly would have made by a sub-sale of goods to a third party, cannot be recovered for, unless it is shown, either by interpretation of the contract itself or by proof of circumstances, that the loss was in the contemplation of the parties at the time of making the contract.[13]

9—De Ford v. Maryland Steel Co., (1902) 113 Fed. 72, 51 C. C. A. 59.

10—French v. Merchants, etc., Co., (1908) 199 Mass. 433, 85 N. E. 424, 19 L. R. A. (N. S.) 1006.

11—Devereux v. Buckley, (1877) 34 O. St. 16, 32 Am. Rep. 342; Smith v. Green, (1875) 1 C. P. Div. 92, 23 E. R. C. 566.

12—Leonard v. New York, etc., Telegraph Co., (1870) 41 N. Y. 544, 1 Am. Rep. 446.

13—"Where a plaintiff under such circumstances as the present [breach of contract of sale, where seller knew of buyer's subcontract] is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must show that the defendant, at the time he made his contract with the plaintiff, knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract. If such subcontract was not made known to him at all the defendant cannot be made liable for what the plain-

The rules of proximity and those of certainty must not be confused. Often, when certainty is lacking, the damage is incorrectly said, for that reason, to be too remote. The requirement of certainty, however, properly permeates the whole field of damages, so that we are bound to meet it in cases involving proximity and remoteness, as in other cases.

The following statement of the general rule as to damages in contracts, is made by Blackburn, J.: "The measure of damages when a party has not fulfilled his contract is what might be reasonably expected * * * to flow from the nonfulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz., that if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller, because if he had known what the consequence would be he would probably have stipulated for more time, or, at all events, have used greater exertions if he knew that that extreme mischief would follow from the nonfulfilment of his contract. On the other hand, if the party has knowledge of circumstances which would make the damages more extensive than they would be in an ordinary case, he would be liable to the special consequences, because he has knowledge of the circumstances which would make the natural consequences greater than in the other case." [14]

11. **Causation in Tort.**—In tort, the formulation and application of proper rules of causation gives far more trouble than in contract. This is due partly to confusion of the principles of negligence with those of causation, and partly to a confusion of proximity of cause in torts with naturalness and probability of result in contracts.

tiff has had to pay under it."—Grebert-Borgnis v. Nugent, (1885) L. R. 15 Q. B. Div. 85.

14—Cory v. Thames Ironworks & Shipbuilding Co., (1868) L. R. 3 Q. B. 181.

Circumstances of tort cases vary widely, and a rule of proximate cause or result, that seems perfectly sound in the case in the decision of which it is laid down, fails to bear close scrutiny when examined in connection with some other case, in which some circumstance presents an unexpected obstacle to the orderly operation of what had seemed a very good general rule. In no field is there less of uniformity of rule; and in no part of the law has there been more of loose thought and unfirm grounding of decisions.[15]

It is somewhat difficult to classify the holdings on the subject, and no classification of these cases can possibly be made on any sharp and clear lines of demarcation; but the decisions may be placed roughly in three groups. On account of ambiguity of expression or meagerness of the statement of principles, it is impossible or nearly impossible to classify some of the holdings at all. All decisions in torts require that, in order to constitute a basis of recovery of damages, the damage must be a proximate

15—"Where damages are claimed for the breach of a contract, it has been said that the nearest application of anything like a fixed rule is, that the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Cockburn, C. J., in Hobbs v. London & S. W. Railway Co., (1875) L. R. 10 Q. B. 117. In tort, they must be the legal and natural consequence of the wrongful act. Sedgwick on Damages, 82, and cases cited; 2 Gr. Ev. §§ 252-256, and cases cited. But an examination of the numerous cases where this matter has been carefully and learnedly discussed, shows that the intrinsic difficulties of the subject are not removed, although they may be aided, by the application of such rules. Whether the extent, degree, and intimacy of causation are sufficient to bring the injurious consequences of an act within the circle of those wrongs for which the law supplies a remedy, still remains the great question to be determined in each case upon its individual facts. That the subject is one beset with difficulties is conspicuously shown by the great number of cases from Scott v. Shepherd, (1772) 2 Wm. Bl. 892 (where Sir William Blackstone was unable to agree with the court), down to the present time, in which judges of equal learning and ability have differed as to the application of rules by which all admit they are to be governed."—Gilman v. Noyes, (1876) 57 N. H. 627.

result of the defendant's wrong. The cases of our three groups simply define "proximate" differently.

The first group treats "proximate" as meaning substantially "proximate, natural, and probable," and rigidly holds that there can be no recovery for an element of damage, unless such particular element was reasonably to be expected by the tortfeasor at the time of committing the tort,—reasonably to be anticipated as a natural and probable consequence.[16] It is in this group of cases that

16—Pullman Palace Car Co. v. Barker, (1878) 4 Colo. 344, 34 Am. Rep. 89. For criticism of this case, see p. 55 note. See also Hoag v. Lakeshore, etc., R. Co., (1877) 85 Pa. 293, 27 Am. Rep. 653. In the latter case, a recent landslide had thrown the defendant's oil train from the track. The oil tanks burst, and the oil, becoming ignited, flowed down into a creek, just then augmented by recent rains. Flowing down the creek, the burning oil ignited and destroyed the plaintiff's buildings, which were 300 or 400 feet from the track. No strong case of negligence was made out; perhaps it could properly be said that no negligence was shown by the evidence; but the court, refraining from a determination of this point, decided in favor of the defendant, on the ground that, even granting that the defendant was negligent, the damage to the plaintiff was too remote to warrant a recovery. The strictness of the rule laid down by the court is shown best by the following quotation from the decision: "It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the landslide. The obstruction itself was unexpected. An engine had passed along within ten minutes, with a clear track. But the obstruction was there, and the tender struck it. The probable consequence of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil-tanks; the oil taking fire; the burning oil running into and being carried down the stream; and the sudden rising of the waters of the stream by means of which, in part at least, the burning oil set fire to the plaintiff's buildings? This would be a severe rule to apply, and might have made the defendants responsible for the destruction of property for miles down Oil Creek." As the author has said in criticizing this case, in 83 Cent. L. J. 149 note, "It is interesting to note the remark of the court to the effect that a different rule in this case 'might have made the defendants liable for the destruction of property for miles down Oil Creek.' Even if such were the obvious result of a holding adverse to the com-

we find it most evident that the court has confused rules of contract with those of tort and has often hopelessly intermingled the rules for determining the fact of negligence with the rules for ascertaining the fact of proximity of cause and effect. It is founded upon no sound principle and is not the view of most courts today. Most of the cases of this group are negligence cases.

The second group, like the first, holds that the consequences, in order to be proximate, must be natural and probable, but puts in the important qualification that, in order to be proximate, the particular injury need not be such a one as the tortfeasor might be said to have had in his contemplation at the time of the commission of the tort, but that it is sufficiently natural and probable if it was of a class of consequences which the tortfeasor might reasonably be said to have had in contemplation.[17] This qualification keeps decisions of the second group from arriving at some of the wholly absurd conclusions set forth in some cases of the first group. More cases may be classified as falling within this group than within the two others, most jurisdictions now following substan-

pany, it would not constitute a valid argument against such a holding. Distance in space, and lapse of time, of themselves, without any independent, efficient, intervening cause, cannot properly be said so to break causal connection as to cut off a right of action.'' The case seems to be based entirely upon unsatisfactory reasoning, placing the railroad's nonliability upon the grounds: first, that the company's servants could not have foreseen the exact injurious results which the plaintiff has suffered; and second, that the application of a different rule might make the railroad's liability very large. The grotesque nature of the latter ground is so apparent that it would not seem that it should be seriously argued that it should have any influence in framing a rule of proximate cause. The language of the court indicates plainly that no rule of proximate cause must be applied which will be too severe on the defendant. No such principle is law.

These cases seem sufficiently to illustrate the fantastic workings of the rule applied in the first group of cases.

17—Brown v. Chicago, M. & St. P. Ry. Co., (1882) 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41; Benedict Pineapple Co. v. Atlantic Coast Line R. Co., (1908) 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92.

tially the rule stated in this paragraph. The rule, however, is not logical, for it, like the rule set forth in the first group of cases, treats "proximate" as meaning not only "proximate," but also "natural" and "probable;" nor is it nearly always satisfactory in the results it produces. When once the fact of defendant's wilful tort or negligence is proven, it would seem that inquiry whether he contemplated the injuries resulting to the plaintiff or any results of the same kind, should be immaterial, if no independent, efficient cause intervenes between the defendant's wrong and the plaintiff's injuries. To hold that the defendant is liable only for results of the kind he may be taken to have expected as a reasonable man, leads to the conclusion that there must be cases of horrible wrong, negligently inflicted, with no remedy against the wrongdoer, merely because he cannot be considered to have contemplated such injuries. This second rule is often uncertain and confused in the manner of its administration, but it usually brings about the same practical net results as does the more logical rule administered in cases of the third group and considered in the next paragraph.

The third group of cases simply takes the sound and rational view that "proximate" means "proximate," and that only. These cases consider naturalness and probability only as regards the fact of negligence or wilful wrong, carefully differentiating between the rule for deciding whether there is negligence and that for determining what consequences of the negligence shall be made the basis of compensation. In Isham v. Dow,[18] the Su-

18—(1898) 70 Vt. 588, 41 Atl. 585, 45 L. R. A. 87, 67 Am. St. Rep. 691. Perhaps the clearest exposition of this view thus far made in a decision is the following, from a recent Massachusetts case, under a workmen's compensation act: "The inquiry as to reasonable and probable consequences did not arise in the Daniels Case [another Massachusetts case under the same statute], but it does arise in actions at common law and under some other statutes in order to decide whether there has been negligence. Even then the ques-

preme Court of Vermont very properly says: "When negligence is established, it imposes liability for all the injurious consequences that flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. But in administering this rule, care must be taken to distinguish between what is negligence and what the liability for its injurious consequences. On the question of what is negligence, it is

tion is not whether 'the consequence is a reasonable and probable one,' but whether harm to some one of the same general kind as that sustained by the plaintiff was a reasonable and probable result of the act complained of as bearing upon the ultimate question whether there was negligence on the part of the defendant. Negligence may be found even though the particular result of the act may not have been susceptible of being foreseen. (Citing cases.) Other instances where liability is not predicated upon negligence, and where therefore there is no occasion to consider in any aspect natural and probable consequences, are actions to recover damages arising from fires set by locomotive engines. Bowen v. Boston & A. R. Co., 179 Mass. 524, 61 N. E. 141; from a vicious animal knowingly kept, Marble v. Ross, 124 Mass. 44, 1 Am. Neg. Cas. 424; from dogs, Pressey v. Wirth, 3 Allen 191, 1 Am. Neg. Cas. 143; or from the breaking of impounded water, Rylands v. Fletcher, L. R. 3 H. L. 330. So far as concerns conduct of defendants, liability follows absolutely in such cases when the particular decisive fact is shown to exist."—In re Sponatski, (1915) 220 Mass. 526, 108 N. E. 466, 8 N. C. C. A. 1025. Although this is a case arising under a statute, these remarks are clearly applicable to common law cases, just as they purport to be.

" 'The general rule in tort,' says Mr. Sutherland (3 Suth. Dam. 714), 'is that the party who commits a trespass, or other wrongful act, is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the probable result of the act done.' This is expressly sanctioned in the Maryland case cited where a cancer was the intervening cause. It is a contradiction to say that parties contemplate—have in mind—things of which they are supposed to be unmindful."—McNamara v. Village of Clintonville, (1885) 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722.

"The inquiry must * * * always be whether there was any intermediate cause disconnected from the primary fault, and self operating, which produced the injury."—Milwaukee & St. Paul Ry. Co. v. Kellogg, (1876) 94 U. S. 469, 24 L. ed. 256.

material to consider what a prudent man might reasonably have anticipated; but when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability." Likewise, where it is necessary or expedient for the plaintiff to show the wilfulness of the defendant's wrongful act, the fact that the injury to the plaintiff would be a natural and probable consequence of the wrong, which the defendant, as a reasonable man, must have foreseen, is highly pertinent as showing the wilfulness of the defendant's wrongful act. In cases wherein negligence is so gross as to amount to evidence of malice or wilfulness, inherent likelihood that the injurious consequences would follow, is material as indicating the wanton state of the defendant's mind at the time of the occurrence of the negligence. But, just as, in the cases based upon acts alleged only to be negligent, one must not confuse rules for ascertaining the fact of negligence with rules for ascertaining the proximity of causal connection between the negligent act and the damage, so here one must not mix principles as to malice or wilfulness with those of causation.

The tendency of most courts today is decidedly away from the rule stated as that of the first group; and, as many cases indicate, there is an inclination either to follow the cases of the third group or so to administer the rule of the second group as to give substantially the same results as would be had in cases of the third group under similar circumstances. Just where the court of a given state stands on the matter is sometimes a little difficult to ascertain, as slightly varying rules, or interpretations of rules, governing the matter, are sometimes handed down by the same court on slightly varying states of fact. On few subjects is it more important to examine adjudicated cases in the state in which a new case arises, although even this precaution does not always give a fair forecast of what the court is going to hold in the particular

case. When confronted by a case presenting new and unforeseen facts, a court sometimes finds it necessary to modify or completely overturn a rule of proximate cause laid down in an earlier case.[19] If the court has laid down

19—An interesting case on negligence and proximate cause is Adderley v. Great Northern Ry. Co., [1905] 2 I. R. 378, 4 B. R. C. 293.

"There is no infallible rule by which one can distinguish between a proximate and a remote cause."—Societe Nouvelle D'Armement v. United States S. S. Co., (1910) 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210.

"Few questions have more frequently come before the courts than that whether a particular mischief was the result of a particular default. It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance. The rules of law are reasonably well settled, however difficult they may be of application to the varied affairs of life."—Moody, J., in Atchison, etc., R. Co. v. Calhoun, (1908) 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. 321.

Although these and other expressions of judicial opinion forcefully and advisedly warn us against the undiscriminating use of rules and precedents in determining proximity, probably no judge would say that the most carefully formulated rules of causation are of no value whatever, or that well-reasoned cases may not properly be given much consideration in the decision of future cases very similar as to facts.

"The general rule in torts applied to such actions as those of negligence is that a wrongdoer is responsible for the natural and proximate consequences of his conduct, and what are such consequences must be generally left for the determination of the jury. * * * I think the rule must be regarded as well recognized that in an action brought for the redress of a wrong intentionally, willfully and maliciously committed, the wrongdoer will be held responsible for the injuries which he has directly caused even though they lie beyond the limit of natural and apprehended results as established in cases where the injury was unintentional."—Garrison v. Sun Printing, etc., Association, (1912) 207 N. Y. 1, 100 N. E. 430, Ann. Cas. 1914 C 288, citing: Milwaukee & St. P. Ry. Co. v. Kellogg, (1876) 94 U. S. 469, 24 L. ed. 256; Spade v. Lynn & Boston R. Co., (1897) 168 Mass. 285, 47 N. E. 88, 60 Am. St. Rep. 393, 38 L. R. A. 512; Lehrer v. Elmore, (1896) 100 Ky. 56, 37 S. W. 292; Meagher v. Driscoll, (1868) 99 Mass. 281, 96 Am. Dec. 759; Swift v. Dickerman, (1863) 31 Conn. 285; Eten v. Luyster, (1875) 60 N. Y. 252; Williams v. Underhill, (1901) 71 N. Y. Supp. 291, 63 App. Div. 223.

For an excellent discussion of the difference between "immediate cause" and "producing cause," see Deisenreiter v. Kraus-Merkel Malting Co., (1897) 97 Wis. 279, 72 N. W. 735. The proximate cause

any but the rule in Isham v. Dow, above mentioned, it is likely to find it necessary to vary from its rule in order to do justice in some cases that arise.

12. **Intervening Cause.**—The question whether the wrong of the defendant was a proximate cause of the damage to the plaintiff, usually resolves itself into a question whether some certain event or condition is an independent, efficient cause intervening between the defendant's act and the plaintiff's loss. Judicial opinions vary greatly as to whether certain things constitute intervening, independent, efficient cause. What seems to one court to be merely a link in an unbroken chain of causal connection, entirely dependent upon the defendant's wrong, set in motion or caused to operate by his wrong, seems to another court to be an absolutely independent act, event, or condition, completely severing the causal connection between the defendant's wrongful act and the damage to the plaintiff. There are, however, a few general principles, which are usually followed in deciding questions of intervening cause.

The simplest and clearest case of independent, efficient, intervening cause is the wholly voluntary act of the plaintiff or of a third party or of an animal, not rendered necessary or likely by the defendant's wrongful act. Here is no difficulty. The defendant wrongdoer cannot be held liable for consequences which are brought about by the acts of free agents not in any sense impelled by the acts of the defendant.[20]

with which a court is concerned is not necessarily the immediate cause, but it must be the producing or efficient cause.

20—"One of the most valuable tests to apply to determine whether a negligent act is the proximate or remote cause of an injury is to determine whether a responsible human agency has intervened between the fact accomplished and its alleged cause."—Societe Nouvelle D'Armement v. United States S. S. Co., (1910) 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210. It must, however, be remembered that, when once it is settled that no human agency has

Where the owner of a building negligently permits oil and waste to be stored therein, and others overturn a lamp, setting fire to and destroying the building, the owner's negligence is not the proximate cause of the loss of the building.[21]

Under the doctrine of "attractive nuisance," the person who maintains a thing likely to attract small children into danger may be held liable for damage resulting to young and indiscreet children from negligent maintenance, where they are lured by the attraction and injured thereby. The act of the child, backed only by his immature volition, is not regarded as an independent efficient intervening cause.[22]

Defendant's negligence in maintaining a loosened mallet in connection with a "striking machine" in its amuse-

intervened in a given case, the question of intervening cause is only parly settled, as it is still necessary to determine whether an act of God, an act of an animal, or an accident, presents itself as an independent intervening cause.

Acts of persons as intervening cause: Rhad v. Duquesne Light Co., (1917) 255 Pa. 409, 100 Atl. 262, L. R. A. 1917 D 864; Vicars v. Wilcocks, (1806) 8 East 1, 103 Eng. Repr. 244; Chesapeake & Ohio Ry. Co. v. Wills, (1910) 111 Va. 32, 68 S. E. 395, 32 L. R. A. (N. S.) 280; Tisdale v. Norton, (1844) 8 Metc. (Mass.) 388.

Act of animal as intervening cause: Hadwell v. Righton, [1907] 2 K. B. 345, 5 B. R. C. 115, 76 L. J. K. B. N. S. 891, 71 J. P. 499, 97 L. T. N. S. 133, 23 Times L. R. 548, 5 L. G. R. 881.

"The fact that between the defendant's fault and the plaintiff's injury there are intermediate acts of other persons, even of the plaintiff, will not render the injury too remote for legal contemplation and redress, if the intervening acts are not wrongful, and either naturally follow upon the defendant's misconduct, or merely furnish the conditions on which that misconduct operates."—McCann v. Newark & S. O. R. Co., (1896) 58 N. J. Law 642, 34 Atl. 1052, 33 L. R. A. 127.

21—Beckham v. Seaboard Air Line Ry. Co., (1907) 127 Ga. 550, 56 S. E. 638, 12 L. R. A. (N. S.) 476.

22—Elwood v. Addison, (1901) 26 Ind. App. 28, 59 N. E. 47, 11 Am. Neg. Rep. 496; Indianapolis v. Emmelman, (1886) 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65; Mattson v. Minnesota etc. R. Co., (1905) 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498. Contra: Carpenter v. Miller, (1911) 232 Pa. 362, 81 Atl. 439, 36 L. R. A. (N. S.) 932.

ment park, was the proximate cause of plaintiff's injury by the flying off of the head of the mallet when he attempted to use it.[23]

A carrier failing to light its cars and badly overcrowding them is not liable for the robbery of a passenger, the proximate cause being the act of the robber.[24]

A carrier wrongfully carrying a passenger past his station is not liable for injury resulting to him from exposure to an unexpected storm during his walk to his home, if it was possible for him to protect himself by stopping at a house, the proximate cause of the injury being plaintiff's voluntarily exposing himself to the storm.[25]

The act of an animal does not always break the chain of causation. Where the negligence of the defendant is the immediate cause of an act of an animal, which act in turn causes injury to the plaintiff, the defendant is usually held to be liable. This is often put upon the ground that the act of the animal and the resulting injury were natural and probable consequences of the defendant's negligence,—a kind of consequences which he might have foreseen as a reasonable man.[26]

Where an inanimate agency, not set in motion or made possible of operation by defendant's wrong, is the immediate cause of the injury, the defendant's wrongful act can be no more than a mere remote cause, as the inani-

23—Wodnik v. Luna Park Amusement Co., (1912) 69 Wash. 638, 125 Pac. 941, 42 L. R. A. (N. S.) 1070. The act of the plaintiff in using the mallet cannot be said to be an independent intervening cause, as it is an act induced by the invitation of the defendant and expected by both parties. Ill consequences of negligence of the defendant in the maintenance of his apparatus are both probable and proximate.

24—Chancey v. Norfolk & W. R. Co., (1917) 174 N. Car. 351, 93 S. E. 834.

25—Garland v. Carolina, etc., Ry., (1916) 172 N. Car. 638, 90 S. E. 779, L. R. A. 1917 B 706; Le Beau v. Minneapolis, St. P., etc., R. Co., (1916) 164 Wis. 30, 159 N. W. 577, L. R. A. 1917 A 1017.

26—Fake v. Addicks, (1890) 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716.

mate agency has certainly broken the causal connection between the wrong and the damage. Some of the most difficult cases are those in which a negligent delay by a carrier has caused goods to suffer the effects of a storm or flood. If the carrier, knowing, as he always does, that the danger of accidental destruction will be increased by keeping the goods in transit for an unnecessary length of time, negligently delays, thus permitting the goods to be acted upon by an injurious natural agency, which otherwise could not have reached them, it would seem, on principle, that he should respond in damages.[27] But this view is not always taken.[28] The question of naturalness and probability of the occurrence of such an intervening cause is given great weight in the decision of many cases. Where, through defendant's wrong, a storm or a freeze is given opportunity to injure the goods of plaintiff, the question whether an act of God is here an independent intervening cause, has given the courts much difficulty; and the decisions are far from being harmonious. Most of the cases involving this question are negligence cases, and, here as elsewhere, it is essential to a clear understanding of all the matters involved, that we keep the question of the fact of negligence carefully distinguished from the question of causation. If the defendant should have foreseen that his conduct might result in exposing the plaintiff's goods to hazards of the weather, it is reasonable to hold that he has been negligent. He having

27—Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co., (1906) 130 Ia. 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882.

28—Memphis, etc., R. Co. v. Reeves, (1869) 10 Wall. (U. S.) 176, 19 L. ed. 909. In the ordinary, simple instance of a carrier's pleading an act of God, questions of negligence and intervening cause, such as those here discussed, do not arise, the only question being whether the loss is occasioned by the act of God, in which case it is simply regarded as coming under one of the well recognized exceptions to the rule of absolute liability of a common carrier of goods. In such cases, no question of the carrier's wrong is involved; it is only a question whether the common carrier's extraordinary liability covers the loss in question.

been negligent, and his negligence having been proved to be the efficient cause of the subjection of the plaintiff's goods to the elements, it follows that he should be held liable for the loss.

Similar in principle are cases wherein fires have been negligently set by the defendant and driven by a high wind in such a manner as to do damage to the plaintiff or his property. Clearly, the defendant must be held liable, if the occurrence of the intervening event immediately causing the injury, together with such consequent injury, should have been foreseen by the defendant as a natural and probable result of his wrong.[29]

Where a municipality negligently permits a hole to exist in a sidewalk, and such hole fills with water, which freezes, and the resulting ice causes a pedestrian, in the exercise of due care, to slip and be injured, it would seem that there is no independent cause intervening between the negligence and the injury;[30] but the law is sometimes held to be otherwise.[31]

In some instances, the defendant, by his wrong, has made it necessary that the plaintiff or third persons do certain acts for the purpose of avoiding damage. Such acts are not independent of the defendant's wrong, and damage produced by an act done for the purpose of avoiding injurious consequences of such wrong, are not remote from it. Reasonable acts for the purpose of avoiding damages do not break the chain of causation between defendant's wrong and the damage resulting proximately from such reasonable acts. The attempt of the plaintiff or of a third person to stop a horse which has been

29—Milwaukee & St. P. Ry. Co. v. Kellogg, (1876) 94 U. S. 469, 24 L. ed. 256; Liming v. Illinois Central R. Co., (1890) 81 Ia. 246, 47 N. W. 66; Lillibridge v. McCann, (1898) 117 Mich. 84, 75 N. W. 288, 41 L. R. A. 381, 72 Am. St. Rep. 553.

30—Adams v. Chicopee, (1888) 147 Mass. 440, 18 N. E. 231.

31—Chamberlain v. City of Oshkosh, (1893) 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928.

frightened through defendant's negligence, does not make subsequent injury to the plaintiff's person or property by the runaway horse a remote result of such negligence.[32] Likewise, where the wrong of the defendant has necessitated a surgical operation upon the plaintiff and such operation has resulted in injury, it has been held that defendant's wrong is still a proximate cause of such injury.[33]

Where plaintiff in a personal injury case used ordinary care in the selection of a physician, the malpractice of the physician in treating the injury is held not to be such an intervening cause as to break the chain of causal connection between the original wrong and plaintiff's final condition. It is said that "the injury caused by the malpractice would not have occurred but for the original injury, and results because of such injury, and was a proximate result thereof."[34] This seems to be a correct gen-

32—Griggs v. Fleckenstein, (1869) 14 Minn. 81, 100 Am. Dec. 199. See also Halesrap v. Gregory, [1895] 1 Q. B. 561.

33—Rettig v. Fifth Ave. Transp. Co. Limited, (1893) 6 Misc. 328, 26 N. Y. Supp. 896. So held also under employers' liability act, Shirt v. Calico Printers' Association, Limited, [1909] 2 K. B. 51, 3 B. R. C. 62, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430. See note on "Accident as proximate cause of death under anesthetic," 3 B. R. C. 65. If plaintiff has exercised reasonable care in securing a physician, he is not required to insure such physician's professional skill or his "immunity from accident, mistake, or error in judgment." Stover v. Bluehill, (1863) 51 Me. 439; Loeser v. Humphrey, (1884) 41 O. St. 378, 52 Am. Rep. 86. See also: Terre Haute & Indianapolis R. Co. v. Buck, (1884) 96 Ind. 346, 49 Am. Rep. 168, where malarial fever is held not an independent intervening cause; Beauchamp v. Saginaw Mining Co., (1883) 50 Mich. 163, 15 N. W. 65, 15 Am. Rep. 30, similar holding as to pneumonia; and Wieting v. Millston, (1890) 77 Wis. 523, 46 N. W. 879, where it is so held as to accidental second breaking of plaintiff's leg, first broken wrongfully by defendant.

34—Hooyman v. Reeve, (Wis. 1919) 170 N. W. 282. See also: Pullman Palace Car Co. v. Bluhm, (1884) 109 Ill. 20, 50 Am. Rep. 601; Chicago C. R. Co. v. Cooney, (1902) 196 Ill. 466, 63 N. E. 1029; Goshen v. England, (1889) 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; Rice v. Des Moines, (1875) 40 Ia. 638; Stover v. Bluehill, (1863) 51 Me. 439; McGarrahan v. New York, N. H. & H. R. Co., (1898)

eral rule, and its application is clear in cases wherein the physician has done no act of such a nature as to constitute an independent intervening cause; but it is submitted that the mere question, "Would the loss have occurred but for defendant's wrong?" is not an adequate test as to proximate cause. To make the answer to this question the one determining fact in deciding the legal relation between cause and effect, is to make possible the assessment of damages for losses extremely remote from the wrong complained of. Where a surgeon, in attempting to cure an injury wrongfully caused, negligently operates on the wrong side of the patient's body, mistaking him for another patient, the surgeon's act is a wholly wrongful, independent and intervening cause, for which the original wrongdoer is not responsible, although it would not have occurred but for the original wrong.[35]

Refusal of an injured person to submit to a surgical operation, which might or might not have saved his life, does not break the chain of causal connection between his injury and his death. In such a case, there is no proof that such refusal was even a contributing cause of his death.[36]

If plaintiff, after receiving a personal injury, has attended to such duties as he might prudently perform, and, in so doing, has incurred serious injury, the person who inflicted the original wrong is still liable and his liability extends to the total amount of the injury, as no negligence of plaintiff has broken the causal connection.[37]

171 Mass. 211, 50 N. E. 610; Purchase v. Seelye, (Mass. 1918) 121 N. E. 413; Reed v. Detroit, (1896) 108 Mich. 224, 65 N. W. 967; Tuttle v. Farmington, (1876) 58 N. H. 13; Boynton v. Somersworth, (1878) 58 N. H. 321; Batton v. Public S. C., (1908) 75 N. J. Law 857, 69 Atl. 164, 18 L. R. A. (N. S.) 640, 127 Am. St. Rep. 855; Lyons v. Erie Ry. Co., (1874) 57 N. Y. 489; Loeser v. Humphrey, (1884) 41 O. St. 378, 52 Am. Rep. 86.

35—Purchase v. Seelye, (Mass. 1918) 121 N. E. 413.

36—Sullivan v. Tioga R. Co., (1889) 112 N. Y. 643, 20 N. E. 569, 8 Am. St. Rep. 793.

37—Batton v. Public Service

Quick and uncontemplated acts of the plaintiff or of third persons, sometimes practically involuntary, rendered likely or necessary by the defendant's wrong, do not constitute an independent intervening cause.[38] An involuntary or purely accidental act of the plaintiff is, under some circumstances, held not to break causal connection.[39]

Where a pre-existent physical condition of the plaintiff has made a tortious injury by the defendant more serious than it would have been if his condition at the time of the infliction of the injury had been normal, it is sometimes contended that such pre-existing condition is an independent intervening cause; but the overwhelming weight of authority is against this contention.[40] If it were held that the weakness or diseased condition of a person, if unknown to the tortfeasor, broke the causal connection between a negligent or wilful wrong to his person and the consequences thereof, some of the most terrible in-

Corporation, (1908) 75 N. J. Law 857, 69 Atl. 164, 18 L. R. A. (N. S.) 640, 127 Am. St. Rep. 855.

38—Scott v. Shepherd, (1773) 2 W. Bl. 892, 96 Eng. Repr. 525, 3 Wils. (K. B.) 403, 95 Eng. Repr. 1124.

39—Such is the usual quick act of a person actuated by fright caused by an explosion or fire resulting from defendant's negligence. See Gannon v. New York, N. H. & H. R. Co., (1899) 173 Mass. 40, 52 N. E. 1075, 43 L. R. A. 833, 5 Am. Neg. Rep. 613, where plaintiff impulsively and unguardedly tried to escape from a car in which a blaze had started. See also Williamson v. St. Louis Transit Co., (1907) 202 Mo. 345, 100 S. W. 1072.

40—Mann Boudoir Car Co. v. Dupre, (1893) 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289; Tice v. Munn, (1883) 94 N. Y. 621; Brown v. Chicago, M. & St. P. Ry. Co., (1882) 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41; Vosburg v. Putney, (1890) 78 Wis. 85, 80 Wis. 523, 47 N. W. 99, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47. Contra: Pullman Palace Car Co. v. Barker, (1878) 4 Colo. 344, 34 Am. Rep. 89.

Likewise, under workmen's compensation acts, it is customary to allow compensation for an injury, even though a previous weakness of the workman has contributed to such injury, provided only that the latter has arisen out of the employment. Bell v. Hayes-Ionia Co., (1916) 192 Mich. 90, 158 N. W. 179; Hartz v. Hartford Faience Co., (1916) 90 Conn. 539, 97 Atl. 1020.

juries ever inflicted by a wrongdoer would be practically wrongs without remedies.

The mere intervention of time, space, events, physical objects, or conditions, is not of itself an intervening cause, although it may have a tendency to show that a cause has had opportunity to intervene.[41] A long period of time may elapse between defendant's wrong and the occurrence of the resulting loss for which he is held liable, distance and physical objects may intervene between the place of the wrongdoing and the place of its injurious effect, many events contributing or not contributing to the result may occur, and pre-existent conditions may aid in bringing about the injury; but these do not necessarily break causal connection, although proof of them, in many instances, will tend to weaken the plaintiff's case, by affording an indication that some intervening and independent event is the juridical cause of the damage.

13. **The Doctrine of Last Clear Chance.**—Just as defendant's negligence, in order to give a right of action, must be the proximate cause of damage to plaintiff, so plaintiff's contributory negligence is not the cause of his injury, in a legal sense, if subsequent negligence of defendant intervenes and proximately causes the damage complained of. To put it in another way, if defendant had a last clear chance to avoid damage, he is liable, although contributory negligence of plaintiff has occurred.

Where plaintiff negligently walked upon a trestle of defendant railway company and was struck and injured by defendant's train, although defendant's engineer had a last clear chance to avoid the accident by slowing down or stopping, then the proximate cause of the accident is the failure of defendant's engineer to exercise due care to prevent the accident.[42]

41—See Milwaukee & St. P. Ry. Co. v. Kellogg, (1876) 94 U. S. 469, 24 L. ed. 256.

42—Bogan v. Carolina Central R. Co., (1901) 129 N. Car. 154, 39 S. E. 808, 55 L. R. A. 418.

Where plaintiff negligently crossed defendant's electric railroad track ahead of a car, and was struck and injured, and defendant's motorman had a last clear chance to avoid, defendant is liable.[43]

Where plaintiff, a small boy, was negligently crossing a street, looking at pictures of noted ball-players, and not paying attention to his own safety, and defendant, in an automobile, struck and injured him after having a last clear chance to avoid, defendant is liable.[44]

14. **Proximate Cause Under Industrial and Civil Damage Statutes.**—Under statutes securing a right of action to a workman against his employer for injuries occurring in the course of the employment, the change from the common law is sometimes more revolutionary in the matter of the granting of the right of action in the beginning, and, usually, in laying down more or less arbitrary sums to be paid as compensation for certain injuries sustained

"In some cases there may have been negligence on the part of a plaintiff remotely connected with the accident, and in these cases the question arises whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the oft-quoted donkey case, Davies v. Mann. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident within the rule upon this subject."—Tuff v. Warman, (1857) 2 C. B. N. S. 739.

"The case therein cited (Davies v. Mann, [1842] 10 M. &. W. 546, 152 Eng. Repr. 588), in which the plaintiff's immortal donkey, by its death, established a world-known name, is regarded as the origin of the rule. The plaintiff fettered the front feet of his donkey, and turned him into a public highway to graze. The defendant's wagon coming down a slight descent at a 'smartish' pace, ran against the donkey, and knocked it down, the wheels of the wagon passing over it. The poor brute meekly closed its wearied eyes and gave up the ghost, an apparently immortal spirit that has long since put Banquo's ghost to shame. From such a humble beginning arose the great doctrine of the 'last clear chance.'"—Bogan v. Carolina Central R. Co., supra.

43—Pilmer v. Boise Traction Co., (1908) 14 Idaho 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254.

44—Deputy v. Kimmell, (1914) 73 W. Va. 595, 80 S. E. 919, Ann. Cas. 1916 E 656.

by workmen receiving certain wages, than it is in affecting the operation of the principles of proximate cause. Where a statute allows a right of action for injuries received in the course of employment, there is often great liberality in deciding that an accident has proximately resulted from the employment, some of the cases having allowed compensation for injuries sustaining no very close causal connection with such employment;[45] but, where a statute has not expressly or impliedly abolished the requirement of a proximate causal connection, it would seem that, on sound principle, the rules of proximate cause remain, as of old, unshaken.[46] If, however, the legislature sees fit to abolish the defense of the contributory negligence of the employee, the possibility of pleading such contributory negligence as an intervening cause is gone, and the law of proximate cause is thus far affected. There is one feature of these acts which affects the basic right to maintain the action, and that is the feature dispensing with the necessity of proving the negligence of the employer; but this does not of itself make it unnecessary to show a causal connection between the employment or the violation of the statute by the employer, on the one hand, and the injury, on the other. Where a statute holds an employer liable, without regard to the question of his negligence, the question of proximate cause may still sometimes arise, but the question is then stripped of the troublesome possibilities of the cases that are grounded in negligence. In negligence cases, the question whether the defendant was negligent is too often confounded with the question whether there is proximity of cause and result; but, where his liability is made absolute, by statute, when certain facts appear, we have one

45—See In re Loper, (Ind. 1917) 116 N. E. 324.

46—Even with the exceedingly liberal constructions placed upon such statutes, independent intervening causes sometimes assume considerable importance. See Botana v. Joseph F. Paul Co., (1916) 224 Mass. 395, 113 N. E. 358.

of the clearest cases in which to see the workings of rules of causation.[47]

A common type of modern legislation is the "civil damage act," permitting recovery from a liquor dealer under certain circumstances. "Civil damage acts" do not always appear in just the same form, some giving relief for injury "in consequence of the intoxication," some for injury "by reason of the intoxication," some for injury "in consequence of the furnishing," and others for injury "by any intoxicated person."[48] Even when the wording of such a statute is closely scrutinized and compared with that of other similar statutes, one cannot always be sure as to possible holdings of courts thereunder, as decisions on identical statutes of this kind sometimes vary. Some of these statutes are held to dispense with all necessity of showing any proximity of cause and result, while others, sometimes worded in identically the same manner, are held to give a right of action only if proximity of causal relation is established.[49] Where the result must be shown to be proximate, the general mode of determining proximity is similar to that existing under the common law.

15. **Proximate Cause a Question for the Jury.**—In general, the question whether a given result is proximate, is for the jury. "It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it."[50] This does not

47—In re Sponatski, (1915) 220 Mass. 526, 108 N. E. 466, 8 N. C. C. A. 1025.

48—See notes, 13 L. R. A. (N. S.) 1158, and 50 L. R. A. (N. S.) 858.

49—Not necessary to show that intoxication was proximate cause of injury: Bistline v. Ney, (1907) 134 Ia. 172, 111 N. W. 422, 13 L. R. A. (N. S.) 1158; Heikkala v. Isaacson, (1913) 178 Mich. 176, 144 N. W. 508; New v. McKechnie, (1884) 95 N. Y. 632, 47 Am. Rep. 89.

No recovery unless intoxication was proximate cause: Horn v. Smith, (1875) 77 Ill. 381; Stecher v. People, (1905) 217 Ill. 348, 75 N. E. 501; Davis v. Standish, (1882) 26 Hun (N. Y.) 608.

50—Milwaukee & St. P. Ry. Co.

mean, however, that the jury is absolutely unrestricted in its findings on the question whether certain results in a given case are proximate to the defendant's wrongful act.[51] The verdict of the jury as to this matter, as in regard to anything else, must be sustained by evidence; and it must not be the product of mere whim or caprice. If there is no evidence upon which to base a verdict to the effect that the wrongful act was the proximate cause of the result, the trial court should instruct the jury in such a manner that a verdict finding proximity of cause and result where there can be no such proximity, will not be rendered. Neither a trial court nor an appellate court, however, can properly interfere at will with the prerogative of the jury in this case any more than in any other case, and it is only where the jury could not, on the evidence, properly find any relation of proximate cause and result that there should be a peremptory instruction or a setting aside of the verdict.

CASE ILLUSTRATIONS

1. A crank shaft of plaintiff's engine broke, causing their mill to be stopped. Defendant carriers agreed to transport the shaft to the factory, where it was to be used as a pattern for a new one; but defendants were not informed that a delay would result in a loss of profits at the mill. The shaft was so delayed by defendants that the new shaft reached plaintiff's several days late, the delay causing plaintiffs' mill to remain idle for several days. Held, that profits cannot be taken into consideration at all in estimating the damages. Such consequences would not have occurred in the great multitude of cases of the kind; and no notice of the special circumstances had been given to the defendants.[52]

2. A contracts to sell to B an article of limited production, not easily bought in the market, but supplies B with an inferior

v. Kellogg, (1876) 94 U. S. 469, 24 L. ed. 256.

51—Johnson v. Winona, etc., R. Co., (1865) 11 Minn. 296, 88 Am. Dec. 83; Griggs v. Fleckenstein, (1869) 14 Minn. 81, 100 Am. Dec. 199; Milwaukee & St. P. Ry. Co. v. Kellogg, supra.

52—Hadley v. Baxendale, (1854) 9 Exch. 341, 5 E. R. C. 502.

article. B may recover for such loss as he has suffered in his own manufacture because of the breach; or he may recover the difference between the contract price he paid the vendor and the price he was to receive from his own vendees. "This is a loss which springs directly from the non-fulfilment of the contract."[53]

3. Vendor fails to deliver an engine to vendee within the time agreed upon. "The proper rule for estimating this portion of the damages in the present case was, to ascertain what would have been a fair price to pay for the use of the engine and machinery, in view of all the hazards and chances of the business." Speculative profits are not allowed. "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed."[54]

4. Defendants contracted to supply skins to plaintiff. At the time of making the contract, plaintiff informed defendants that he was about to complete or had completed a contract with a customer in Paris, and that he would use the skins to fulfill such contract. Defendants broke contract by not supplying skins. Plaintiff was unable to buy skins to fulfill his Paris contract. Plaintiff may recover lost profits. Defendants knew of the sub contract, so that the profits were in the contemplation of the parties at the time of making the contract. Plaintiff could not have avoided the damage, as he could not purchase similar goods.[55]

5. Defendant contracted to deliver to plaintiff 100,000 pounds of Minie bullets, 58-calibre, U. S. Rifle Musket, knowing that plaintiff was purchasing the bullets to fulfill an existing contract with the State of Ohio. The bullets as specified were not delivered, but bullets of all calibres, useless for the purpose intended, were supplied instead. Plaintiff recovers the profits that would have accrued to him upon fulfilling the contract of re-sale, and also the transportation charges plaintiff has paid on the goods. "The general rule is, that the party injured by a breach of a

53—McHose v. Fulmer, (1873) 73 Pa. 365.

54—Griffin v. Colver, (1858) 16 N. Y. 489, 69 Am. Dec. 718.

55—Grebert-Borgnis v. Nugent, (1885) L. R. 15 Q. B. 85.

contract, is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach." Profits on re-sale, and transportation charges, were in the contemplation of the parties at the time of making this contract.[56]

6. A wool dealer delivered to a telegraph company a message to Toland, one of his agents, in cipher, without telling the agent the meaning of its contents or the possible effect of an incorrect transmission. The message was erroneously made so to read as to request Toland to buy 500,000 pounds of wool. In compliance therewith, the agent actually bought 300,000 pounds, on which the dealer lost $20,000. The dealer can recover of the telegraph company only such amount as he paid for the transmission of the message. "According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising, according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties, when they made the contract, as a probable result of a breach of it."[57]

7. Plaintiff contracted to furnish a church with pews by a certain date, and further agreed to pay $10 per day as liquidated damages for each day the pews were delayed beyond the time stated. He shipped the pews by defendant's railroad, giving notice of his contract with the church, including the provision for liquidated damages. Defendant broke its contract by being 24 days late in completing the transportation of the pews. In the settlement with the church, plaintiff allowed a deduction of $180 for the delay. Plaintiff recovers the $180 of defendant railroad. The loss complained of was a natural consequence of the breach.[58]

8. Defendant sold plaintiff a cow, warranting her free from foot and mouth disease, a malady the cow really had at the time of the sale. Plaintiff, being a farmer, placed the cow with his

56—Messmore v. New York Shot & Lead Co., (1869) 40 N. Y. 422.

57—Primrose v. Western Union Tel. Co., (1894) 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. 1098.

58—Illinois Central R. Co. v. Southern Seating, etc., Co., (1900) 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729.

other cows, and they contracted the disease. The defendant is liable, not only for the loss of the cow sold, but also for the loss of the other cows, if he knew that plaintiff was a farmer, so that he would be likely to place the cow with other cows.[59]

9. Defendent contracted to store plaintiff's goods at Kingsland Road, but deposited them in another place, where they were destroyed by fire. In plaintiff's policy of insurance on the goods, Kingsland Road was specified as the place of deposit, and so the benefit of the insurance was lost. Plaintiff can recover the amount of this loss. The damage is not too remote. The bare possibility that the loss would have occurred anyway if the wrongful act had never been done, cannot be set up by the defendant.[60]

10. "The plaintiffs took tickets to be conveyed from the Wimbleton station of the defendant's railway to Hampton Court. It so happened that the train did not go to Hampton Court, and the plaintiffs were taken on to Esher Station, which increased the distance which they would have to go from the railway station to their home by two or three miles." Held, that plaintiffs can recover for their inconvenience, but not for the illness of the female plaintiff, resulting from exposure to cold, which was incident to the walk from Esher to Hampton. The illness "is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it."[61]

59—Smith v. Green, (1875) L. R. 1 C. P. Div. 92, 23 E. R. C. 566. Accord: Sherrod v. Langdon, (1866) 21 Iowa 518: "The ground of the recovery is, that the loss actually happened, while defendants' wrongful act was in operation—a loss attributable to their wrong or fraudulent act, and it is not for them to say, we did not know plaintiffs had other sheep, and hence did not contemplate or undertake to be liable for so great a loss."

60—Lillie v. Doubleday, (1881) L. R. 7 Q. B. Div. 510.

61—Hobbs v. London & Southwestern Ry., (1875) L. R. 10 Q. B. 111. The holding that the illness was too remote to admit of recovery, seems unsound. As is said in McNamara v. Clintonville, (1885) 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722, the Hobbs case is "severely criticised and narrowly limited, if not entirely overruled" by McMahon v. Field, (1881) 7 Q. B. Div. 591. In the latter case, plaintiff contracted for room for his horses in defendant's barn. Defendant nevertheless rented the same space to a third person, who turned out plaintiff's horses, which resulted in their taking cold before

11. Defendants contracted to name to plaintiff a good stockbroker, but negligently named a broker who was an undischarged bankrupt and was dishonest. Plaintiff, relying upon defendant's statement, sent sums of money to the broker for investment. The broker misappropriated these sums. Defendants are liable for plaintiff's loss. The intervention of the crime which directly caused the damage, does not render the damages too remote.[62]

12. Defendant commits a battery upon plaintiff, causing the latter to become subject to fits. The fits are a direct result of the battery.[63]

13. In a collision between plaintiff on a bicycle, and the automobile of the defendant, plaintiff received slight injuries. Four or five weeks later, he contracted typhoid fever, and it appeared that food, water, and air were the only media by which typhoid could be communicated. A physician testified that, in his opinion, there was a connection between the accident and the typhoid, but did not explain the connection. The evidence does not sustain a verdict that takes the typhoid into account.[64]

14. A threw a lighted squib into a crowd. B, to prevent injury to himself and to the goods of X, threw the squib away, toward C, who, to save himself and his goods, also threw it away, striking D, bursting and putting out his eye. A must respond in damages to D.[65]

plaintiff could provide other shelter for them. Defendant was held liable for the injury to the horses, on the ground that their expulsion and consequent injury were such results of the breach as should have been contemplated by defendant as probable results.

62—De la Bere v. Pearson, Limited, (1907) [1908] 1 K. B. 280, 1 B. R. C. 21, 77 L. J. K. B. N. S. 380, 98 L. T. N. S. 71, 24 Times L. R. 120.

63—Sloan v. Edwards, (1883) 61 Md. 89.

64—Slack v. Joyce, (1916) 163 Wis. 567, 158 N. W. 310. "It appears from the evidence that typhoid fever is neither the natural nor probable result of physical injury such as plaintiff sustained, and the only evidence in the case is that referred to of Dr. Hosmer to the effect that there was a connection between plaintiff's sickness and the accident; that he considered this all of the time; but he does not say that the injury caused the disease, and he does not explain what he means by connection between the illness and the injury. The connection between the disease and the injuries, in order to form a basis for damages, cannot be left to surmise or conjecture, but must rest upon proof."

65—Scott v. Shepherd, (1773) 2 W. Bl. 892, 96 Eng. Repr. 525, 3

15. X railway company sold A a ticket purporting to entitle holder to travel over certain railroads, including that of the Y railway company, from Omaha to New York. Y had given X no authority to sell such a ticket. Y refused to honor the ticket, and ejected A with unjustifiably violent and excessive force, for which A recovered judgment against Y for $7,000. Y spent over $13,000 in defense of the action brought by A. Y cannot recover from X its expenditures in connection with A's action. Y had a simple remedy, which it had applied—namely, to eject A. As between the two companies, that closed the matter. If the ejection was accompanied by unnecessary force, it was upon Y's responsibility, and X cannot be held responsible.[66]

16. Defendant railroad company's servant directed plaintiff, a passenger, to a wrong train. Finding that he was being carried in a wrong direction, plaintiff tried to alight while the train was in motion, and was injured. Held, that the misdirection by the railroad company was not a proximate cause of his injuries.[67]

17. Plaintiff was mistakenly directed by defendant railway company's servants to leave the train at a point some distance from the station at which he intended to alight. It was night, and plaintiff, in attempting to make his way to the station, fell into a cattle-guard and was seriously injured. Held, that defendant is not liable. Defendant's wrong was not the proximate cause of the injury of plaintiff. The injury is held to be "the result of pure accident." [68]

18. Defendant's electric car was coming down-grade, at a speed of 40 to 50 miles an hour, swaying from side to side. Plaintiff, in his automobile, was coming toward defendant's car, in the opposite direction. The trolley wheel of defendant's car left the wire, and was thrown against the left forward wheel of

Wils. (K. B.) 403, 95 Eng. Repr. 1124.

66—Pennsylvania R. Co. v. Wabash, etc., R. Co., (1895) 157 U. S. 225, 39 L. ed. 682, 15 Sup. Ct. 576.

67—Chesapeake & Ohio Ry. Co. v. Wills, (1910) 111 Va. 32, 68 S. E. 395, 32 L. R. A. (N. S.) 280. Seemingly contra: Newcomb v. New York Central & H. R. R. Co., (1904) 182 Mo. 687, 81 S. W. 1069; but it is to be noticed that, in the latter case, a defective platform, on which plaintiff alighted, is involved.

68—Lewis v. Flint & Pere Marquette Ry. Co., (1884) 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790. A recent case in accord is Brown v. Linville River Ry. Co., (N. Car. 1917) 94 S. E. 431.

the automobile, causing it to turn sharply to the right, toward a bank. The plaintiff, expecting that his machine would "turn turtle," jumped out and was injured. Held, that this is a case for the jury.[69]

19. Defendant's car, on which plaintiff was a passenger, partially left the track and was approaching a bridge over a river. Plaintiff leaped from the car just before the car reached the bridge, and was injured. The leap, if a reasonable act, such as would have been done by a person of ordinary prudence, does not break causal connection between the derailment and plaintiff's injury.[70]

20. Plaintiff's blind horse, harnessed to a sleigh, became frightened, and plaintiff, on account of the presence of a large pile of ashes left in the street by the defendant city and the presence also of a loaded wagon coming in the opposite direction, had to guide his horse within the twelve feet remaining between the wagon and the curb. Plaintiff was unable to guide his horse with precision, and so the cross-bar of his sleigh struck a hydrant-nozzle, plaintiff being thrown against the hydrant and injured. Held, that, the heap of ashes was, at most, only one of several proximate causes of the accident, and that it cannot be said that it was the cause without which it would not have occurred.[71]

21. Defendant's chauffeur left defendant's automobile on an incline, with engine stopped and brake set. A 12-year old boy, passing by, rattled the brake, releasing it. As a result, the automobile struck and injured plaintiff. "The proximate cause of the injury was the interference of the boy, over whom the defendant had no control, and for whose act it was not responsible."[72]

22. A railroad company's night watchman at a freight-house was supposed to be required to see that all doors were bolted, but he was not informed of this duty. A doorman of the company had failed to bolt a certain door, through which a trespasser later escaped, and, while doing so, shot the night watch-

69—Hull v. Berkshire St. Ry. Co., (1914) 217 Mass. 361, 104 N. E. 747.

70—La Prelle v. Fordyce, (1893) 4 Tex. Civ. App. 391, 23 S. W. 453, 6 Am. Neg. Cas. 658.

71—Ring v. City of Cohoes, (1879) 77 N. Y. 83, 33 Am. Rep. 574.

72—Rhad v. Duquesne Light Co., (1917) 255 Pa. 409, 100 Atl. 262, L. R. A. 1917 D 864.

man. Held, that the master, the company, is not liable. The failure of the doorman to bolt the door was merely a condition making entrance into the building less difficult. The cause of the injury to the night watchman was the unrelated criminal act of the trespasser.[73]

23. A stranger entered the office of the defendant, and tried to kill the defendant by means of a bomb. The defendant shielded himself by holding the plaintiff, his clerk, between himself and the exploding bomb. Plaintiff was thereby injured. Held, that defendant is not liable. The proximate cause of the injury to the plaintiff is held to be the wrongful act of the stranger, and not the act of the defendant.[74]

24. Defendant, a balloonist, descended into plaintiff's garden, drawing to him a crowd, who trod upon the plants of plaintiff. Held, that plaintiff may recover for the damage done by the balloon and also that done by the crowd. These were all natural and probable results.[75]

25. Defendant negligently leaves explosives where they are easily reached by children. Not being old enough fully to comprehend the danger, several children, including the plaintiff, play with the explosive, by which plaintiff and others are seriously injured. Defendant is liable. Although an intervening cause brought about the injury, such cause was set in motion by the defendant's negligence.[76]

26. Defendant's fowls were in the road, perhaps wrongfully. A dog belonging to a third person frightened one of the fowls, causing it to fly into the spokes of the bicycle of plaintiff, who was riding along the road. Plaintiff and his bicycle were injured by the resulting fall. Held, that defendant is not liable. "The negligence, if any, of allowing the fowl to be there was not connected with the damage."[77]

73—Fraser v. Chicago, R. I. & P. Ry. Co., (Kan. 1917) 165 Pac. 831.

74—Laidlaw v. Sage, (1899) 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216.

75—Guille v. Swan, (1822) 19 Johns. (N. Y.) 381, 10 Am. Dec. 234.

76—Mattson v. Minnesota, etc. R. Co., (1905) 95 Minn. 477, 104 N. W. 443, 70 L. R. A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498; Folsom-Morris Coal Mining Co. v. DeVork, (Okla. 1916) 160 Pac. 64.

77—Hadwell v. Righton, [1907] 2 K. B. 345, 5 B. R. C. 115, 76 L. J. K. B. N. S. 891, 71 J. P. 499, 97 L. T. N. S. 133, 23 Times L. R. 548, 5 L. G. R. 881.

27. The driver of defendant's horse car whipped his horses, causing the car to give a sudden bounce. Plaintiff's wife, a passenger, was jolted off the platform of the car, alighting on her feet unhurt. A moment afterward, she was struck by a runaway horse, knocked down, and injured. Held, that the injuries are not a proximate result of her being jolted from the car. "The jolting from the car simply landed her on her feet, and inflicted no injury. But another agency intervened, which was entirely independent of any act of the defendant, and that agency alone inflicted the injury in question." [78]

28. Defendant knowingly kept a vicious dog, upon which plaintiff accidentally stepped. The dog severely bit and lacerated plaintiff's leg. Defendant is liable. Plaintiff's inadvertance in stepping upon the dog did not constitute an efficient intervening cause, so as to break the causal connection between the negligence of the defendant in not restraining the animal, and the injury.[79]

29. Plaintiff, for no justifiable purpose, kicked defendant's dog, which, in consequence of the kick, bit plaintiff. "If the plaintiff wantonly irritated and aggravated the dog, and the dog bit him, in repelling his aggression, and not from a mischievous propensity, * * * then the plaintiff should not be allowed to recover for damages caused by his own wrong." [80]

30. Defendant negligently burned a canvas cover used to protect plaintiff's growing pineapple plants and fruit from injury by cold and frost. As a result, the plants and fruit were exposed to cold weather and injured. A declaration setting up such facts is sufficient on demurrer. "Results that follow in ordinary,

78—South-Side Passenger Ry. Co. v. Trich, (1887) 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672.

79—Fake v. Addicks, (1890) 45 Minn. 37, 47 N. W. 450, 22 Am. St. Rep. 716; referring to Smith v. Pelah, (1745) 2 Str. 1264, 93 Eng. Repr. 1171, as saying "that if a dog has once bit a man, and the owner thereof with notice keeps the dog, and lets him go about or lie at his door, an action lies at the suit of the person who is bit, though it happened by such person's treading on the dog's toes, for it was owing to his not hanging the dog on the first notice, and the safety of the king's subjects is not afterwards to be endangered." See note on "Keeping of animal as proximate cause of injury," 2 B. R. C. 29. See also Muller v. McKesson, (1878) 73 N. Y. 195, 29 Am. Rep. 123, which reviews a number of cases.

80—Keightlinger v. Egan, (1872) 65 Ill. 235.

natural, continuous sequence from a negligent act or omission, and are not produced by an independent efficient cause, are proximate results of the negligence, and for such results the negligent party is liable in damages, even though the particular results that did follow were not foreseen."[81]

31. Goods are delivered to a common carrier for transportation. Through the carrier's negligence, they are delayed, by reason of which they are subjected to a sudden flood while in transit, and are destroyed or damaged. The carrier is liable. "Now, while it is true that defendant could not have anticipated this particular flood and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay that [they] would not have been destroyed; and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper."[82]

32. Defendant, carrier of logs, negligently delayed in the transportation of plaintiff's logs. Unusually early cold weather came, freezing them in the ice of the river in which they had been placed. Freshets in December and in the spring carried them down the river and out to sea. Held, that defendant's negligence was the proximate cause of the loss, that even the unusually early freeze was not an independent intervening cause, and that unusually large freshets were not such cause, if the loss would likewise have occurred during an ordinary freshet.[83]

81—Benedict Pineapple Co. v. Atlantic Coast Line R. Co., (1908) 55 Fla. 514, 46 So. 732, 20 L. R. A. (N. S.) 92.

82—Green-Wheeler Shoe Co. v. Chicago, R. I. & P. Ry. Co., (1906) 130 Ia. 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882. Contra: Denny v. New York Central R. Co., (1859) 13 Gray (Mass.) 481, 74 Am. Dec. 645. Authority on the point is well divided.

83—Marsh v. Great Northern Paper Co., (1906) 101 Me. 489, 64 Atl. 844. It is to be noticed that the court lays stress upon the fact that, although unusual, the early freeze was not so unusual that the possibility of it should have been "eliminated from consideration by a prudent person who had undertaken a work of this magnitude." "Climatic conditions are so frequently unusual that this fact

33. Defendant, the owner of a steamboat, contracted to carry plaintiff's horses, which he later lost by the sinking of his vessel by running it upon the mast of a schooner recently sunk in a squall. Defendant, under the extraordinary liability of a common carrier, is liable. In this case, there is no proximate cause intervening between defendant's acts in the course of carriage and the loss.[84]

34. Defendant's steamer negligently pumped, or allowed to drip, into a harbor, large quantities of highly combustible fuel oil, which collected under a wharf, between vessels and the wharf. As the tide began to come in, the mass of oil, matted together with debris, moved partially out from under the wharf and surrounded the steel bark of plaintiff. In some manner, probably from a burning cigar, a spark, or a live coal, the oil on the water became ignited, causing the wharf to burn, and damaging plaintiff's vessel. The negligence of defendant's steamer was the proximate cause of the damage.[85]

35. Defendant railroad company's engine set fire to grass in the right of way. A high wind carried the fire toward the barn of X. Y helped X to remove his horses from the barn; but the fire, being driven to the barn more quickly than was expected, severely injured Y before he succeeded in escaping from the building. Defendant is liable to Y. Its wrongful act is the proximate cause of Y's injury.[86]

36. Fire negligently set by defendant upon property of a third person, burned across a large area to plaintiff's property and consumed it. Held, that defendant's negligence was not the proximate cause of plaintiff's loss, as the property of other persons intervened, and the condition of the intervening properties intervened as a cause. It was further held that the question of proximate cause was for the court.[87]

must be anticipated and guarded against.'' See also Cumberland, etc., Co. v. Stambaugh, (1910) 137 Ky. 528, 126 S. W. 106, 31 L. R. A. (N. S.) 1131, and L. R. A. note thereto.

84—Merritt v. Earle, (1864) 29 N. Y. 115, 26 Am. Dec. 292.

85—Societe Nouvelle D'Armement v. United States S. S. Co., (1910) 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1210. Cf. Hoag v. Lake Shore, etc., R. Co., (1877) 85 Pa. 293, 27 Am. Rep. 653.

86—Liming v. Illinois Central R. Co., (1890) 81 Ia. 246, 47 N. W. 66.

87—Hoffman v. King, (1899) 160 N. Y. 618, 55 N. E. 401, 46 L. R. A.

37. Defendants set fire to grass on their own property. Owing to a change in the wind, defendants' buildings burned, and also plaintiff's, the fire seeming to have blown to them from defendant's buildings, a quarter of a mile away. Held, that the question of proximate cause is for the jury.[88]

38. The fire department was unable to put out a fire in plaintiff's house, because defendant railroad company had wrongfully occupied and extended a river bank, thus preventing the department from obtaining water from the river. Held, that defendant is not liable for plaintiff's loss by fire. Defendant's acts are said to "have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery."[89]

39. Plaintiff had wood deposited on a levee, accessible only by a bridge maintained by defendant city. The bridge became impassable, and the defendant negligently failed to repair it. Plaintiff was therefore unable to remove its wood, which was washed away by a flood. Defendant is held not liable for the loss. "All that can be said is, that defendants' negligence caused plaintiff to delay removing the wood; the delay exposed the wood to the flood, whereby it was lost. Plaintiff's damage, then, was not the proximate consequence of the acts of defendant complained of, but resulting from a remote consequence joined with another circumstance, the flood."[90]

40. Defendant town failed to keep its highway in repair. Plaintiff, using the highway, because of the defects therein, went from it into an adjoining field, where he was injured. Defendant is not liable. The injury is not a proximate result of defendant's negligence.[91]

41. A city failed to light a bridge. Amid the darkness and

672, 73 Am. St. Rep. 715; Van, J., and Parker, C. J., dissenting. This case is not generally approved or followed outside New York. In Illinois Central R. Co. v. Bailey, (1906) 222 Ill. 480, 78 N. E. 833, the facts were similar, and a judgment for the plaintiff was affirmed, the court saying that a prima facie case was made out.

88—Nall v. Taylor, (1910) 247 Ill. 580, 93 N. E. 359.

89—Bosch v. Burlington & Missouri R. Co., (1876) 44 Ia. 402, 24 Am. Rep. 754.

90—Dubuque Wood & Coal Association v. Dubuque, (1870) 30 Ia. 176.

91—Tisdale v. Norton, (1844) 8 Mete. (Mass.) 388.

some steam from a locomotive, so dense that he could not see ahead, plaintiff's chauffeur ran plaintiff's automobile into a girder dividing the driveway on the bridge. Held, that defendant's negligence, if any, was not the proximate cause of the injury to the automobile.[92]

42. Defendant city negligently permitted a hole to remain in a street. A wagon-wheel fell into the hole, causing a doubletree to become unfastened and to fall against one of the team of horses hitched to the wagon, frightening the team and causing them to collide with the plaintiff. It cannot be said as a matter of law that the defendant is not liable for plaintiff's injuries. The court cannot, in this case, rule that, as a matter of law, the negligence of the city is not the proximate cause of the injuries to the plaintiff.[93]

43. Defendant village negligently maintained a high walk without railings. Plaintiff, without negligence on his part, stepped off the walk, and was injured. He already had a predisposition to inflammatory rheumatism. Because of such predisposition, his injury may have been aggravated and prolonged. The jury has a right to include in its verdict such increased or additional damages.[94]

44. Defendant, a school boy, gave the shin of plaintiff, another school boy, a slight kick. Plaintiff's leg had been injured 50 days earlier, but was now recovering. The kick revivified microbes already in the leg and caused a destruction of the bone through the activity of the microbes, so that plaintiff would never again be able to use the leg. Defendant is liable. "The wrong-

92—Gaines v. New York, (1915) 215 N. Y. 533, 109 N. E. 594, L. R. A. 1917 C 203.

93—Ft. Worth v. Patterson, (Tex. 1917) 196 S. W. 251.

94—McNamara v. Clintonville, (1885) 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722. "It is not likely that the officers of the village actually contemplated that the injury in question would result from the defect in the walk. They must have known, however, that all classes of people, infirm as well as firm, diseased as well as healthy, were liable to travel upon the walk. Under ordinary circumstances the infirm and diseased would have no difficulty in passing over the walk without incurring injury. But the plaintiff, under the circumstances stated, as found by the jury, incurred the injury without any fault on his part. The mere fact that he was more susceptible to serious results from the injury by reason of the presence of disease, did not prevent him from recovering the damages he had actually sustained."

doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him."[95]

45. The servants of defendant railway company directed the plaintiffs to leave defendant's train, in the night, three miles from Mauston, their destination, telling them that it was Mauston. Female plaintiff was then pregnant. Plaintiffs had to walk to Mauston, by reason of which female plaintiff became very ill and had a miscarriage. Defendant is liable for these injuries, even though it did not know of the pregnancy.[96]

46. An employe, at the time of receiving a severe personal injury through the negligence of defendant, was afflicted with a progressive incurable disease, which had not yet advanced to the stage of producing disability. The injury greatly aggravated the disease, so that the employee died in less than a month after his injury. Defendant is liable under the common law.[97]

47. Defendant company negligently permitted its sleeping car

95—Vosburg v. Putney, (1890) 78 Wis. 85, 80 Wis. 523, 47 N. W. 99, 50 N. W. 403, 14 L. R. A. 226, 27 Am. St. Rep. 47.

96—Brown v. Chicago, M. & St. P. Ry. Co., (1882) 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41: "The defendant is not excused because it did not know the state of health of Mrs. Brown, and is equally responsible for the consequences of the walk as though its employees had full knowledge of that fact. * * * Upon the findings of the jury in this case, it appears that the defendant was guilty of wrong in putting the plaintiffs off the cars at the place they did; that in order to protect themselves from the effects of such wrong they made the walk to Mauston; that in making such walk they were guilty of no negligence, but were compelled to make it on account of the defendant's wrongful act; and that, on account of the peculiar state of health of Mrs. Brown at the time, she was injured by such walk. There was no intervening independent cause of the injury, other than the act of the defendant. All the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant. We think, therefore, it must be held that the injury to Mrs. Brown was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury. * * * We can see no reason why the defendant is not equally liable for an injury sustained by a person who is placed in a dangerous position, whether the injury is the immediate result of a wrongful act, or results from the act of the party in endeavoring to escape from the immediate danger."

97—In re Bowers, (Ind. 1917) 116 N. E. 842.

to catch fire, because of which the plaintiff, a female passenger, then in a state of health in which she was very susceptible to injury by exposure, was compelled to leave the car scantily clad, on a cold night. Serious functional disorders resulted, leading to a long illness. Held, that defendant was not liable for the injuries to plaintiff's health, as they were not a proximate result of defendant's negligence.[98]

48. Plaintiff's intestate, while so drunk as to be physically and mentally incapable of taking care of himself, was ejected from defendant's train, in a cut, with ditches, banks, and fences on the sides of the track. He was killed by a later train. Defendant is liable. The ejection, and not the intestate's drunkenness, is the proximate cause of his death.[99]

49. Plaintiff, so drunk as to be almost unconscious, was ejected by defendant from its train, into deep snow, when the temperature was 8 or 10 degrees below zero. As a result, parts of plaintiff's body were frozen, necessitating several amputations. De-

98—Pullman Palace Car Co. v. Barker, (1878) 4 Colo. 344, 34 Am. Rep. 89. The devious and dubious route by which the court arrived at this conclusion is worthy of notice. In the court's opinion, it is actually argued with seriousness that exposure in her then condition intervened as a cause, and that the defendant, having no notice of such condition, could not be held liable for a result of which this unknown state of health was an intervening cause! The case is sustained neither by sound legal principle nor by common sense. As the writer has said in an article in 83 Cent. L. J. 148 (150), "Happily, this holding, making it the duty of every female passenger to tell the brakeman or conductor of any disorder she may at the moment have, is not generally law." More consonant with justice and principle are the following cases contra: Brown v. Chicago, M. & St. P. Ry. Co., supra, denouncing the Barker case as being "unsustained by authority," and "supported by the principles of neither law nor humanity;" and Mann Boudoir Car Co. v. Dupre, (1893) 54 Fed. 646, 4 C. C. A. 540, 21 L. R. A. 289.

99—Louisville & N. R. Co. v. Ellis' Adm'x, (1895) 97 Ky. 330, 30 S. W. 979. Not so where continued presence of deceased on train would have imperiled other passengers and his condition was not such as indicated to the train crew that he was incapable of taking care of himself, since, in such a case, the ejection is necessary in discharge of the carrier's duty to passengers, and "the law does not exact care and precaution against the death of one from remote causes, or self-inflicted, whose conduct has afforded legal grounds for his expulsion." Louisville & N. R. Co. v. Logan, (1889) 88 Ky. 232, 10 S. W. 655, 3 L. R. A. 80, 21 Am. St. Rep. 332, 8 Am. Neg. Cas. 294.

fendant is liable. The ejection of plaintiff, under the circumstances, was the proximate cause of his injuries.[100]

50. Defendant's train was negligently run over hose which was being used to put out a fire in plaintiff's factory. By reason of the consequent cutting off of the water supply, plaintiff's factory was destroyed. Defendant may be held liable. The advantage of which plaintiff was deprived was immediate. Defendant's act was the direct and efficient cause of the loss.[101]

51. Defendant's train blocked a crossing, keeping plaintiff exposed to the elements, by reason of which he became ill. Defendant is held liable.[102]

52. Plaintiff, for more than half an hour, was detained by defendant's train on a crossing. Then a second engine approached and blew off steam, frightening plaintiff's horse, so that it ran away, to the injury of plaintiff's person, horse, buggy and harness. The obstruction of the crossing is not the proximate cause of the injuries.[103]

53. Defendant railroad company kept its crossing blocked for 30 or 40 minutes, keeping a physician from attending plaintiff promptly during childbirth, although the physician requested defendant's employees to open the crossing. Plaintiff's suffering was greatly prolonged, and the physician found it necessary to adopt, in delivering plaintiff of the child, a method attended by laceration. Defendant is liable for plaintiff's suffering and injury, its negligence being the proximate cause thereof. It is not necessary that defendant's servants should have contemplated that this particular result would ensue; it is sufficient that they ought to have anticipated that some traveler might be detained, and that injury therefrom might result to the traveler or to some one else.[104]

54. Defendant's excursion train blocked a crossing for half an hour to an hour, just as the sun was setting, detaining plaintiff and her daughter. Negro passengers stepped off at the

100—Louisville, C. & L. R. Co. v. Sullivan, (1884) 81 Ky. 624, 50 Am. Rep. 186, 8 Am. Neg. Cas. 286.

101—Metallic Compression Casting Co. v. Fitchburg R. Co., (1872) 109 Mass. 277, 12 Am. Rep. 689.

102—Louisville, N. O. & T. Ry. Co. v. Durfee, (1891) 69 Miss. 439, 13 So. 697.

103—Stanton v. Louisville & N. R. Co., (1891) 91 Ala. 382, 8 So. 798, 11 Am. Neg. Cas. 66.

104—Terry v. New Orleans, etc., R. Co., (1913) 103 Miss. 679, 60 So. 729, 44 L. R. A. (N. S.) 1069.

crossing, swore, and used obscene language, fought, and fired a pistol, terrorizing plaintiff and her little girl. As a result of the delay, plaintiff had to drive home in the dark. Becoming alarmed at the danger of turning over, she jumped from the buggy, injuring her knee. "The negligence was not the proximate cause of either injury complained of."[105]

55. Defendant's train partly blocked a crossing. At the invitation of defendant's flagman, plaintiff tried to drive his gentle horse across the small part of the crossing remaining open. The horse shied, causing the buggy to collide with the rear end of the train, throwing out and injuring plaintiff. Defendant is liable. "The shying of the horse cannot be regarded as the sole proximate cause. The obstruction which had been placed in the highway directly contributed to the accident, and the jury was justified in so finding."[106]

56. Plaintiff was riding on horseback on a road, which, at its intersection with defendant's railroad, was deeply cut, as was also the railroad, preventing persons on the road from seeing trains before they were within a few feet of the rails. Defendant, neglecting its statutory duty, failed to give a signal of the approach of its train, as required by statute, as a result of which plaintiff was within 15 or 20 feet of the train before she saw it. Her horse, becoming frightened, ran with her 100 yards or more, and threw her in turning a curve, and dragged her a short distance, injuring her severely. The appellate court refused to interfere with a verdict for plaintiff, as these are facts from which the jury was entitled to find that the negligence was the proximate cause of the injury.[107]

57. While plaintiff was riding on horseback on a road parallel to the defendant's railroad, defendant's train approached a nearby crossing without giving the signals required by statute. Plaintiff's horse became frightened at the train, which was going in the same direction, ran away, and attempted to cross the railroad at a crossing in front of the train. The horse collided with

105—Shields v. Louisville & N. R. Co., (1895) 97 Ky. 103, 29 S. W. 978, 27 L. R. A. 680.

106—Chicago & N. W. R. Co. v. Prescott, (1893) 59 Fed. 237, 8 C. C. A. 109, 23 L. R. A. 654.

107—Illinois Central R. Co. v. Mizell, (1896) 100 Ky. 235, 38 S. W. 5.

the train, and plaintiff was thrown off and injured by the collision. Defendant is not liable. Defendant's statutory negligence was not the proximate cause of plaintiff's injury. "It was not the failure to give the crossing signals that caused the horse to run off, or that resulted in the injury to Conway."[108]

58. Defendants wrongfully and maliciously sued out a writ of attachment against goods of plaintiff. Held, that, in the particular case, damages could be recovered for the expenditures actually made in the defense of the suit, the depreciation of the value of the stock on which the wrongful levy had been made, and also the injury to the business of the plaintiff and his credit and financial reputation. "In actions on the case the party injured may recover from the guilty party for all the direct and actual damages of the wrongful act and the consequential damages flowing therefrom. The injured party is entitled to recover the actual damages and such as are the direct and natural consequences of the tortious act."[109]

59. Plaintiff, a brakeman, alighting from his train, slipped on ice, was overbalanced by a hot box cooler which he was carrying, and was struck by defendant's switch engine, which was being negligently managed. Defendant's negligence was the proximate cause of plaintiff's injury.[110]

60. Plaintiff, a passenger awaiting a train at a railroad station of defendant company, was struck by the dead body of a

108—Conway v. Louisville & N. R. Co., (1909) 135 Ky. 229, 119 S. W. 206. See able dissenting opinion of Hobson, J.

109—Lawrence v. Hagerman (1870) 56 Ill. 68, 8 Am. Rep. 674.

110—Rockhold v. Chicago, R. I. & P. Ry. Co., (1916) 97 Kan. 715, 156 Pac. 775: "The defendant's negligence was clearly the proximate cause of the injury. The two causes contributing to the plaintiff's injury were not distinct and independent of each other (Railway Co. v. Columbia, 65 Kan. 390, 69 Pac. 388, 58 L. R. A. 399), but were related to each other in their operation (Mosier v. Butler County, 82 Kan. 708, 109 Pac. 162). The defendant's negligence was proximate in point of time because the negligently managed engine struck the plaintiff after he became overbalanced,. and was proximate in causal relation because, without it, becoming overbalanced would have been without injurious consequence. The subject is sufficiently covered by two decisions of this court in which accidental slipping of the plaintiff combined with negligence of the defendant produced injury. City of Atchison v. King, 9 Kan. 550, and Barnett v. Cement Co., 91 Kan. 719, 139 Pac. 484."

woman who had just been struck and killed by defendant's locomotive. There was some evidence indicating that defendant's engineer had rung the bell or blown the whistle at the crossing at which the woman was killed. Held, that defendant was not liable for plaintiff's injury.[111]

61. A drove his automobile past a standing street car, in violation of statute, striking B, an alighting passenger, and pushing him against C, another alighting passenger, thus throwing C to the ground and injuring him. A is liable to C. The unlawful driving of A is the proximate cause of the injury.[112]

62. Through the negligence of the defendant, a door fell upon plaintiff's intestate, so injuring him that he had to be removed to a hospital, where he died over five months later, of shock following a skillfully performed surgical operation rendered neces-

111—Wood v. Pennsylvania R. Co., (1896) 177 Pa. 306, 35 Atl. 699, 35 L. R. A. 199, 55 Am. St. Rep. 728. The conclusion seems somewhat questionable. It is to be noticed that naturalness and probability are very heavily stressed in the following extract from the case: "Does any one believe the natural and probable consequence of standing 50 feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? * * * Clearly, it was not the natural and probable consequence of its neglect to give warning, and therefore was not one which it was bound to foresee. The injury, at most, was remotely possible, as distinguished from the natural and probable consequences of the neglect to give warning. As is said in Railroad Co. v. Trich, 117 Pa. 399, 11 Atl. 627, 2 Am. St. Rep. 672. 'Responsibility does not extend to every consequence, which may possibly result from negligence.'" See Columbus R. Co. v. Newsome, (1914) 142 Ga. 674, 83 S. E. 506, L. R. A. 1915 B 1111, in which the defendant negligently ran its electric car against a horse driven by a third party, thrusting the horse against the plaintiff and injuring him. It was held that plaintiff's injuries were a proximate result of defendant's negligence. Possibly the circumstances of the two cases are sufficiently different to justify an attempt to distinguish between them, the impact being a little more direct in the Georgia case. Even if we accept the requirement of the Pennsylvania court in Wood v. Railroad, practically to the effect that, in order to hold a defendant for a consequence of his negligence, the particular result must have been possible to foresee, we can perhaps reconcile the result reached in the Wood case with that in the Columbus case; for the consequence in the latter case was one somewhat more likely to occur.

112—Frankel v. Norris, (1916) 252 Pa. 14, 97 Atl. 104, L. R. A. 1917 E 272.

sary by his injury. At the time of his injury, intestate was 32 years old, strong and healthy, and had never been sick. Defendant is liable for intestate's death. The injury was the cause of the death.[113]

63. A workman's hand was so badly crushed by an accident in the course of his employment, that an operation had to be performed. Ordinarily the operation would have been amputation, but a competent surgeon undertook to save the hand by a double operation, in the second stage of which the workman unexpectedly died under an anesthetic. "There was no reason for apprehending death, but death did ensue." The employer is liable for the death. The administration of the anesthetic was not a new, efficient, intervening cause, as the steps taken to obviate the consequences of the accident were reasonable.[114]

64. Deceased employee received an injury through a splash of molten lead into his eye. As a result, he became insane, and obeying an uncontrollable impulse, without conscious volition to produce death, leaped from a window and was fatally injured. The employer is liable. "The obligation to pay compensation under the Workmen's Compensation Act * * * is absolute when the fact is established that the injury has arisen 'out of and in course of' the employment. It is of no significance whether the precise physical harm was the natural and probable or the abnormal and inconceivable consequence of the employment. * * * The inquiry relates solely to the chain of causation between the injury and the death." [115]

65. A statute prohibited the employment of boys under 14 years of age in coal mines. Defendant employed a boy under 14 in its mine, and he was injured there, while working in a dangerous place without having been given proper instructions. Such employment constitutes negligence on the part of the defendant, and is the proximate cause of an injury which is a natural, probable, and anticipated consequence of the non-observance." [116]

113—Rettig v. Fifth Ave. Transp. Co., Limited, (1893) 26 N. Y. Supp. 896, 6 Misc. 328.

114—Shirt v. Calico Printers' Association, Limited, [1909] 2 K. B. 51, 3 B. R. C. 62, 78 L. J. K. B. N. S. 528, 100 L. T. N. S. 740, 25 Times L. R. 451, 53 Sol. Jo. 430.

115—In re Sponatski, (1915) 220 Mass. 526, 108 N. E. 466, 8 N. C. C. A. 1025.

116—Griffith v. American Coal

66. A libels B, a concert singer in C's oratorio. B therefore refuses to sing for C, for fear of a bad reception at the hands of the public. C can recover nothing of A, as C's loss of B's services is not a proximate result of A's wrong.[117]

67. In an action for assault and battery, plaintiff alleges that, as a result of disability caused by the wrong, he lost the office of surgeons' mate, to which he would have been appointed. Held, too remote a result to allow of recovery, although specially pleaded.[118]

68. A fraudulently sells to B a horse affected with glanders, a disease known to be dangerous to human beings. C has charge of the horse for B and thereby contracts glanders and dies. C's death gives a right of action against A.[119]

Co., (1916) 78 W. Va. 34, 88 S. E. 595. The case holds, however, that liability attaches, not to all injuries in the course of the unlawful employment, but only those injuries against which the statute is intended to guard. The line thus drawn, although probably necessary, is, at best, shadowy and indefinite, making necessary the adjudication of each kind of injury in order to determine whether it falls into the class which the statute is intended to prevent.

117—Ashley v. Harrison, (1793) 1 Esp. 48.

118—Brown v. Cummings, (1863) 7 Allen (Mass.) 507. "The rule of law is, that where special damages are not alleged in the declaration, the plaintiff can prove only such damages as are the necessary as well as proximate result of the act complained of; but where they are alleged, they may be proved so far as they are proximate, though not the necessary result. 1 Chit. Pl. (6th ed.) 441; 2 Greenl. Ev. § 256; Dickinson v. Boyle, (1835) 17 Pick. (Mass.) 78, 28 Am. Dec. 281. As the declaration in this case alleges the loss of the office as special damage, the evidence was admissible, if the loss can be regarded as a proximate result of the assault and battery. So far as we have been able to find authorities on the point (for none were cited on behalf of the plaintiff), they tend to show that it was not proximate, but remote."

See also Boyce v. Bayliffe, (1807) 1 Camp. 58, where an assault and false imprisonment of a passenger by the captain of a ship were held not to be the proximate cause of the passenger's quitting the ship and taking passage on another vessel for the remainder of his journey. "That a man may tranship himself and throw the expense of this upon another, the injury must continue down to the moment of his leaving the first ship, and he must then act with a view to the preservation of his life, or at least from a reasonable regard to his own safety."

119—State v. Fox, (1894) 79 Md. 514, 29 Atl. 601, 24 L. R. A. 679, 47 Am. St. Rep. 424.

CHAPTER V

Avoidable Consequences

16. **In General.**—A plaintiff, either in tort or in contract, cannot recover for such consequences of the defendant's wrong as the plaintiff could have avoided by the exercise of reasonable prudence.[1] "In cases of contract, as well as of tort, it is generally incumbent upon an injured party to do whatever he reasonably can, and to improve all reasonable and proper opportunities to lessen the injury."[2] "The law will not permit him to throw a loss, resulting from a damage to himself, upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might, by common prudence, have prevented."[3] "There is a line of decisions which establish the doctrine that, where one party has broken an executory contract, the other, who is in the right, cannot go on indefinitely as if the contract still were unbroken, but is bound to do what he reasonably can to stop the damages for which the first party will be liable in consequence of his breach."[4] Where plaintiff sues for wrongful obstruction of his drain, which he could have removed for $25, it has been held that he can recover only $25, and not $100 for damage caused by resulting overflow.[5] The defendant is not

1—Indianapolis, etc., R. Co. v. Birney, (1874) 71 Ill. 391; Miller v. Trustees of Mariners' Church, (1830) 7 Me. 51, 20 Am. Dec. 341; Loker v. Damon, (1835) 17 Pick. (Mass.) 284; Clark v. Marsiglia, (1845) 1 Denio (N. Y.) 317, 43 Am. Dec. 670.

2—Sutherland v. Wyer, (1877) 67 Me. 64.

3—Miller v. Trustees of Mariners' Church, supra.

4—Keith v. De Bussigney, (1901) 179 Mass. 255, 60 N. E. 614.

5—Lloyd v. Lloyd, (1888) 60 Vt. 288, 13 Atl. 638. Accord: City of

liable for the destruction of an article which could easily have been removed from a building whose destruction by fire he has negligently caused.[6] One cannot, after receiving a personal injury, do foolhardy things tending to aggravate the injury and then recover damages sufficient to compensate for the injury in its aggravated form. Where a plaintiff, after receiving alleged serious personal injuries through the negligence of a railroad company, walks thirty-seven miles, driving cattle, takes long trips by stage and by train, and calls no physician for about ten days after receiving the hurt, and his work and his neglect to get the necessary treatment aggravate the injury, this aggravation cannot increase the damages to be assessed against the company.[7] Just as contributory negligence, in tort, bars a whole cause of action, so, when once a cause of action either in contract or in tort is established, some of the elements of damage complained of may be barred on the ground that they are avoidable consequences.

17. **Remoteness of Avoidable Consequences.**—Probably the chief reason, on principle, for not allowing the assessment of damages for avoidable consequences, is that they are too remote, as the neglect of the plaintiff to exercise ordinary prudence in endeavoring to avoid harmful consequences of defendant's wrongful act, is an independent cause intervening between the infliction of the wrong and the occurrence of the final result. "In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative and contingent consequences, which the party injured might easily have avoided by his own

Macon v. Dannenberg, (1901) 113 Ga. 1111, 39 S. E. 446.

6—Toledo, P. & W. Ry. Co. v. Pindar, (1870) 53 Ill. 447, 5 Am. Rep. 57.

7—Texas & P. Ry. Co. v. White, (1900) 101 Fed. 928, 42 C. C. A. 86, 62 L. R. A. 90.

act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner knows it, cattle enter and destroy the crop, the treasurer is responsible. But if the owner sees the gate open and passes it frequently and wilfully and obstinately or through gross negligence leaves it open all summer, and cattle get in, it is his own folly. So if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain without repairing a great length of time after notice of the fact, and his furniture, or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote."[8]

18. **Duty of Plaintiff Only to Act as a Reasonable Man.**—It is not, however, required that the plaintiff do any more than a reasonable man would do to avoid injurious consequences of the defendant's wrong. It is not incumbent upon the plaintiff to incur the greatest expense or to put forth the greatest possible efforts to prevent or lessen damage. If he has acted in good faith, shown due diligence, and used reasonable means to avoid the injurious consequences, that is sufficient.[9] A plaintiff in a personal injury case is not obliged to show that he has exercised any more than ordinary care and prudence in securing the service of a physician.[10]

8—Loker v. Damon, (1835) 17 Pick. (Mass.) 284.

9—Loeser v. Humphrey, (1884) 41 O. St. 378, 52 Am. Rep. 86.

10—Texas & P. Ry. Co. v. White, (1900) 101 Fed. 928, 42 C. C. A. 86, 62 L. R. A. 90; Chicago City R. Co. v. Saxby, (1904) 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. Rep. 218; Pullman Palace Car Co. v. Bluhm, (1884) 109 Ill. 20, 50 Am. Rep. 601; Louisville, N. A., etc., R. Co. v. Falvey, (1885) 104 Ind. 409, 3 N. E. 389; Illinois Central R. Co. v. Gheen, (1902) 112 Ky. 695, 68 S. W. 1087; McGarrahan v. New York, N. H. & H. R. Co., (1898) 171 Mass. 211, 50 N. E. 610; Fullerton v. Fordyce, (1897) 144 Mo. 519, 44 S. W. 1053; Berry v. Greenville, (1909) 84 S. Car. 122, 65 S. E. 1030, 19 Ann. Cas. 978; St. Louis Southwestern Ry. Co. v. Johnson,

In a personal injury case, the mere doing of an act which, as a matter of fact, prevents or retards recovery, is not of itself a ground for reduction of damages. In order so to reduce damages, the plaintiff must have violated some duty, that is, he must have committed some negligent act or omitted some duty.[11]

The plaintiff is not required to know what cannot be within his knowledge or to do the impossible. Where a railroad company has negligently killed his livestock, and he does not learn of the fact until the carcasses are valueless, he is not bound to avoid consequences by disposing of the bodies.[12]

It would be error to instruct a jury that plaintiff, in order to recover, must show "that he took proper and immediate steps to have his condition improved," as reasonable care is all that is required.[13]

The mere fact that plaintiff might have avoided damage by an expenditure amounting to somewhat less than the loss, does not diminish his measure of damages.[14] *A fortiori,* one is under no obligation to spend more than the amount of damage done in order to avoid the damage.[15]

The law does not require plaintiff to do something unlawful in order to avoid damage.[16]

19. **Plaintiff Under No Duty to Anticipate and Prevent Wrongful Act of Defendant.**—The plaintiff is under no legal duty to expect that the defendant will commit a wrongful act and to take measures to prevent it. The

(Tex. Civ. App. 1906) 94 S. W. 162; Selleck v. Janesville, (1899) 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892.

11—Salladay v. Dodgeville, (1893) 55 Wis. 318, 55 N. W. 696, 20 L. R. A. 541.

12—Rockford, etc., R. Co. v. Lynch, (1873) 67 Ill. 149.

13—Fullerton v. Fordyce, (1897) 144 Mo. 519, 44 S. W. 1053.

14—Reynolds v. Chandler River Co., (1857) 43 Me. 513.

15—Easterbrook v. Erie Ry. Co., (1865) 51 Barb. (N. Y.) 94.

16—Chicago, R. I. & P. R. Co. v. Carey, (1878) 90 Ill. 514.

mere statement of this rule puts before us a principle so self-evident as to seem almost axiomatic. Yet, in almost half the states, such a principle is given no recognition in one class of cases,—those in which the plaintiff, a passenger on a railway train, has been negligently and wrongfully given an incorrect ticket by one agent of the company, and is wrongfully required later by another agent of the same company to leave the train, in consequence of the first agent's mistake. A large minority of the courts illogically hold that, under such circumstances, the plaintiff must pay again in order to prevent being ordered off of the train or forcibly ejected.[17] A majority of the states hold that the plaintiff has "the option either to pay or leave the train and resort to his legal remedy."[18] being under no legal duty to pay his fare a second time in order to avoid the injury of being wrongfully ordered to leave the train.

20. **Contracts of Employment.**—Where an employer breaks his contract with his employee by discharging him before the expiration of his contractual term of service, "the party employed cannot persist in working, though he is entitled to the damages consequent upon his disappointment."[19] By continuing to work under such circumstances, the employee would merely cause useless damage to himself, and, in some cases, to his employer. Such damage cannot properly be charged to the latter. Furthermore, a wrongfully discharged employee must make reasonable effort to obtain other similar employment in the same vicinity, in order to avoid the loss

17—Norton v. Consolidated Ry. Co., (1906) 79 Conn. 109, 63 Atl. 1087, 118 Am. St. Rep. 132.

18—Yorton v. Milwaukee, etc., R. Co., (1884) 62 Wis. 367, 21 N. W. 516, 23 N. W. 401; Georgia Ry., etc., Co. v. Baker, (1906) 125 Ga. 562, 54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. Rep. 246.

19—Clark v. Marsiglia, (1845) 1 Denio (N. Y.) 317, 43 Am. Dec. 670.

accompanying non-employment.[20] He is not justified in lying idle after the breach.[21]

But, where the contract is not for personal services and is not such as to exclude the contemporaneous performance of other contracts by the same contractor, there is no legal obligation on the part of the contractor to endeavor to avoid idleness by searching for other contracts.[22]

21. **Contracts of Sale.**—Where the vendee under a contract of sale of goods refuses to take the property, the vendor is under a duty to re-sell in order to avoid as much as possible of the loss attendant upon keeping the property.[23] But where vendor specially makes an article for the vendee, there is no such duty to re-sell.[24] Also, where the article is being specially made for the vendee, under a contract, and the vendee countermands his order, the vendor and maker is under a duty to keep his damages small by discontinuing work on the article.[25]

In case of a breach by the vendor, amounting to a failure to tender the goods contracted for, the vendee is under a duty to avoid useless damage to himself, by purchasing elsewhere.[26] It has even been held that, in such a case, the vendee must purchase again of the vendor, breaker of the contract, if that is his only means of getting the goods.[27] Where, however, the purchaser has already paid the wrong-doing seller for the goods,

20—Gillis v. Space, (1872) 63 Barb. (N. Y.) 177; Howard v. Daly, (1875) 61 N. Y. 362.

21—Sutherland v. Wyer, (1877) 67 Me. 64.

22—Sullivan v. McMillan, (1896) 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239; where the contract was to cut and deliver certain logs growing on certain land.

23—Kadish v. Young, (1883) 108 Ill. 170, 43 Am. Rep. 548.

24—Shawhan v. Van Nest, (1874) 25 O. St. 490, 18 Am. Rep. 313.

25—Hosmer v. Wilson, (1859) 7 Mich. 294, 74 Am. Dec. 716.

26—Miller v. Trustees of Mariners' Church, (1830) 7 Me. 51, 20 Am. Dec. 341.

27—Lawrence v. Porter, (1894) 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167; Deere v. Lewis, (1869) 51 Ill. 254.

and therefore no longer has any money with which to buy, he is not required to do the impossible thing by buying again.[28]

CASE ILLUSTRATIONS

1. Defendant wrongfully dug a ditch on plaintiff's mining claim. The ditch overflowed and gradually washed away nearly two acres of plaintiff's land. Held, that it is proper for defendant to show that plaintiff, by the expenditure of $100 for riprapping the bank of the new channel, could have avoided entirely, or materially diminished, the damages to the mining claim.[29]

2. Defendant hires plaintiff's horse and overfeeds and improperly waters him, as a result of which the horse becomes ill and dies. Defendant produces "evidence tending to show that the medicines administered by the veterinary who was called in to take care of the horse upon his return to the stable, were injurious, and contributed to his death." Plaintiff can recover. Only reasonable care and ordinary diligence in seeking for and applying proper remedies is required of the plaintiff.[30]

3. Gas-pipes were so negligently laid by defendants, that gas escaped from them into a well at plaintiff's livery stable. After learning that the well was corrupted by the gas, plaintiff permitted his horses to drink the water of the well. He cannot recover for the injury to the horses resulting from his own carelessness in allowing the horses to drink the water. "He can recover only for the natural and direct consequences of the wrongful act of the defendants, and not for consequential damages which might have been avoided by ordinary care on his part."[31]

4. Plaintiff, a married woman, sustained a personal injury through the negligence of defendant. The injury was later aggravated by her becoming pregnant. "The mere fact that eight weeks after the injury pregnancy occurred, and when no caution in that respect appears to have been given by the medical ad-

28—Illinois Central R. Co. v. Cobb, etc., Co., (1872) 64 Ill. 128.

29—Sweeney v. Montana Central Ry. Co., (1897) 19 Mont. 163, 47 Pac. 791.

30—Eastman v. Sanborn, (1862) 3 Allen (Mass.) 594, 81 Am. Dec. 677.

31—Sherman v. Fall River Iron Works Co., (1861) 2 Allen (Mass.) 524, 79 Am. Dec. 799.

viser, is not necessarily and as a matter of law sufficient ground to justify a reduction of damages for the injury caused by the defendant's negligence, although the results of the injury may have been thereby prolonged, or her recovery delayed."[32]

5. Plaintiff's wife was injured by a fall caused by defendant's negligence in permitting a sidewalk to become out of repair. Despite medical treatment, her foot was permanently incapacitated. "There was no error in charging the jury that plaintiff, having used reasonable care in the employment of physicians of good reputation, was not responsible for their failure to exercise the highest skill and adopt the best means to effect a cure."[33]

6. A sold to B hay, on which A knew white lead had been spilt. B's cow, after eating of the hay, became ill of lead poisoning, and died in about a week. Held, that the following instruction was as favorable as the defendant could require: "If the plaintiff, while the cow was sick and several days before she died, knew that the cow was suffering and in danger of death from lead poison, she was bound to employ the best remedies within her reasonable reach, at reasonable trouble and expense; and if the jury were satisfied that such remedies would have been effectual, and the plaintiff did not seek for their use nor inform the defendant seasonably of the facts, she could not recover."[34]

7. A telegraph company contracted to transmit a message from plaintiff to a sheriff, notifying him not to make a sale of certain land. The telegraph company failed to deliver the message, and the sheriff sold the land. As plaintiff was not financially able to employ a lawyer, he did not move to have the sale set aside. In a suit against the company, held that plaintiff, being financially unable to employ a lawyer, was not obliged to take the legal steps necessary to avoid the sale, which was the consequence of the defendant's wrong. The plaintiff was not required to do the impossible.[35]

8. Plaintiff contracted to play in defendants' museum for 36

32—Salladay v. Dodgeville, (1893) 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541.

33—Selleck v. City of Janesville, (1899) 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892.

34—French v. Vining, (1869) 102 Mass. 132, 3 Am. Rep. 440.

35—Western Union Telegraph Co. v. Wofford, (Tex. Civ. App. 1897) 42 S. W. 119.

weeks, at $35 per week. Defendants wrongfully discharged him at the end of 18 weeks. "The plaintiff could not be justified in lying idle after the breach; but he was bound to use ordinary diligence in securing employment elsewhere, during the remainder of the term; and whatever sum he actually earned or might have earned by the use of reasonable diligence, should be deducted from the amount of the unpaid stipulated wages."[36]

9. A contracts to take advertising space in B's paper, but repudiates the contract before it has been fully performed. B is under a duty to make reasonable efforts to sell the space to other parties; and his damages for the breach are the contract price less the amount he would, by reasonable efforts, have obtained for the space.[37]

10. A contracted to furnish B a certain quantity of hammered stone, to be delivered on a certain day, but made delivery five months late. For A's breach, B is entitled to recover for only such results as he could not avoid by reasonable exertions.[38]

11. A employs B to effect fire insurance on his property. B fails to effect the insurance. A gets notice of such failure, but neglects to insure the property himself. Held, that he cannot recover of B for a loss subsequently occurring by reason of the lack of insurance. "It has been repeatedly held that a party being damaged can not stand by and suffer the injury to continue and increase, without reasonable effort to prevent further loss."[39]

12. Plaintiff's intestate delivered to defendant carrier a sum of money to be transmitted to an insurance company to pay the semi-annual premium on his life insurance. Defendant failed to transmit the money, as a result of which the intestate's policy lapsed. The intestate lived for 15 months thereafter, but made no effort to be re-instated or re-insured, so far as the evidence shows. "We think, however, it was incumbent on him to use the care and adopt all reasonable means in the premises known to him. And unless he can show some legal excuse for not doing

36—Sutherland v. Wyer, (1877) 67 Me. 64.

37—Tradesman Co. v. Superior Mfg. Co., (1907) 147 Mich. 705, 111 N. W. 343, 112 N. W. 708.

38—Miller v. Trustees of Mariners' Church, (1830) 7 Me. 51, 20 Am. Dec. 341.

39—Brant v. Gallup, (1885) 111 Ill. 487, 53 Am. Rep. 638.

so, such as want of knowledge, failure of health, failing circumstances of the company, etc., he should not recover damages for such loss as he might have prevented." [40]

40—Grindle v. Eastern Express Co., (1877) 67 Me. 317, 24 Am. Rep. 31.

CHAPTER VI

Certainty of Proof

22. **In General.**—Whether in tort or in contract, the plaintiff must prove his case by evidence legally admissible. He must prove it to such a degree of certainty that it can be said that a verdict in his favor is supported by the evidence. This is as true in regard to the proof of damages as in regard to any other matter in a case. Damages cannot legally be assessed for loss of which the extent is not proved, or for damage not proved to be a proximate result of defendant's wrong. Damages "must be certain, both in their nature and in respect to the cause from which they proceed."[1] Recovery cannot be had for damage of which either the nature or the cause is hypothetical, conjectural, or speculative.[2] A jury has no right to base its verdict for damages upon mere guessing and speculation. Reasonable exactness of proof is required to fix legal liability, so that results of which the causal relation to the wrong is uncertain, cannot be made a basis of liability.[3] In contract, there is the added fact that the parties cannot properly be said to have contemplated results so vague in their connection with the wrong as to appear uncertain and speculative even after they have occurred.[4]

1—Griffin v. Colver, (1858) 16 N. Y. 489, 69 Am. Dec. 718; Sutherland on Damages, § 53.

2—Richmond & D. R. Co. v. Allison, (1890) 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43; Masterton v. Mt. Vernon, (1874) 58 N. Y. 391; Laidlaw v. Sage, (1899) 158 N. Y. 73, 52 N. E. 679, 44 L. R. A. 216.

3—Griffin v. Colver, (1858) 16 N. Y. 489, 69 Am. Dec. 718; Wilson v. Wernwag, (1907) 217 Pa. 82, 66 Atl. 242, 10 Ann. Cas. 649; 8 R. C. L. 438 et seq.

4—Squire v. Western Union Tel.

23. **Absolute Certainty Not Required.**—It is not required, however, that the plaintiff in a civil case prove his case beyond a reasonable doubt. He is not required to prove damage and the relation thereof to the defendant's wrong to any higher degree than that degree to which he must prove any other part of his case. To hold otherwise would be to put requirements of proof as to damages in a civil case on an equal footing with general requirements in a criminal case. Mere impossibility of computing damages with the utmost accuracy does not prevent the recovery of substantial damages; if either party is to be placed at a disadvantage by reason of such an impossibility, it should be the defendant, whose wrongful conduct has rendered the inquiry as to damages necessary.[5] Exact computation of the loss sustained by the plaintiff is perhaps less frequently possible than impossible, so that too rigid a requirement of certainty of proof as to amount of damage might actually deprive many persons of a remedy rightfully theirs. Likewise, it is sometimes impossible to prove with absolute certainty the causal connection between defendant's wrongful act and the loss complained of; but here again only a proof by a preponderance of the evidence is necessary, as is true in regard to any point in a civil case. Only reasonable certainty of proof should ever be required.[6] It often happens that, at the time of the trial,

Co., (1867) 98 Mass. 232, 93 Am. Dec. 157; Clyde Coal Co. v. Pittsburgh, etc., R. Co., (1910) 226 Pa. 391, 75 Atl. 596, 26 L. R. A. (N. S.) 1191; Sutherland on Damages, § 58 et seq.; 8 R. C. L. 440.

5—Welch v. Ware, (1875) 32 Mich. 77.

"The fact that the injuries are of such a nature as not to be susceptible of exact admeasurement in money value does not make them any the less proximate."—Browning v. Jones, (1893) 52 Ill. App. 597.

6—"It is also the rule that the damages 'must be certain, both in their nature, and in respect to the cause from which they proceed.' This rule, however, is satisfied by a reasonable certainty—'such certainty as satisfies the mind of a prudent and impartial person.' 'In using the words "uncertain, speculative, and contingent," for the purpose of excluding that kind of

the proof is rather unsatisfactory and uncertain as to the final result of the wrong, as in the case of a recent personal injury; but the mere fact that a degree of uncertainty exists does not absolve the wrongdoer. In such cases, the court seeks to have the jury ascertain with reasonable certainty the final actual results by means of evidence of the probable extent of the injury.[7]

Where a latent condition of plaintiff's health causes the results of the defendant's wrong to be greater, the plaintiff is entitled to recover for the entire damage proximately resulting from the wrong, without proving how much he would have suffered from such latent condition if he had not received the injury.[8] This is in ac-

damage, it is not meant to assert that the loss sustained must be proved, with the certainty of a mathematical demonstration, to have been the necessary result of the breach of covenant by defendant. The plaintiff is not bound to show, to a certainty that excludes the possibility of a doubt, that the loss to him resulted from the action of the defendant in violating his agreement. In many cases such proof cannot be given, and yet there may be a reasonable certainty, founded upon certain inferences legitimately and properly deducible from the evidence, that the plaintiff's loss was not only, in fact occasioned by the defendant's violation of his covenant, but that such loss was the natural and proximate result of such violation. Certainty to reasonable intent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract, and was a probable and direct result thereof.''—Bates v. Holbrook, (1904) 85 N. Y. Supp. 673, 89 App. Div. 548, quoting 8 Am. & Eng. Enc. of Law, p. 548, 610.

''The rule against the recovery of uncertain damages has been generally directed against uncertainty as to cause rather than uncertainty as to measure or extent; that is, if it is uncertain whether the defendant's act caused any damage, or whether the damage proved flowed from the defendant's act, there may be no recovery of such uncertain damages; whereas uncertainty which affects merely the measure or extent of the injury does not bar a recovery.''—Crichfield v. Julia, (1906) 147 Fed. 65, 77 C. C. A. 297.

7—People's Ice Co. v. Steamer Excelsior, (1880) 44 Mich. 229, 6 N. W. 636, 38 Am. Rep. 246.

8—Chicago City R. Co. v. Saxby, (1904) 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. Rep. 218; Sherman v. Indianapolis T. & T. Co., (1911) 48 Ind. App. 623,

cord with the well settled principle that only reasonable certainty of proof is required.

The requirement of certainty varies in the mode of its application, according to the circumstances of the particular case. The mode of operation of the rule requiring certain proof can be seen only by examining case illustrations.

24. **Certainty of Proof Not to Be Confused with Proximity of Cause.**—The requirement of certainty of proof must not be confused with that of proximity of result to cause, but there are numerous instances of such confusion. What is really too uncertain is often called "too remote," probably because remote damage is often uncertain and uncertain damage is perhaps usually remote.[9]

CASE ILLUSTRATIONS

1. A contracted to give B the exclusive right to sell "Tom Moore" cigars in a certain territory. B, by his work, built up a large demand for the cigars. A broke the contract by refusing to supply B with more cigars. Held, that B has a right to recover for prospective profits. "It seems never to have been held in this state that, where there is no other measure of damages for breach of contract, a contracting party is to be denied any damage because no better measure than the reasonable prospective profits of a business is attainable. We think that it would be manifestly unjust to deny to the defendant in this case any recovery whatever for breach of his contract because the contract itself contemplated and was based upon prospective profits." [10]

2. Plaintiffs are suing for the purchase price of an engine sold to defendants but delayed in delivery. Defendants seek recoupment in the way of damages for plaintiff's delay. "The defendants were not entitled to measure their damages by estimat-

96 N. E. 473; Hahn v. Delaware, L. & W. R. Co., (N. J. 1918) 105 Atl. 459. See 8 N. C. C. A. 969 note.

9—Johnson v. Connecticut Co., (1912) 85 Conn. 438, 83 Atl. 530, stresses the difference between certainty and probability.

10—Hichhorn v. Bradley, (1902) 117 Ia. 130, 90 N. W. 592.

ing what they might have earned by the use of the engine and their other machinery had the contract been complied with. Nearly every element entering into such a computation would have been of that uncertain character which has uniformly prevented a recovery for speculative profits. But it by no means follows that no allowance could be made to the defendants for the loss of the use of their machinery."[11]

3. Defendant telegraph company undertook to transmit and deliver a message for plaintiff, directing his broker to purchase a certain amount of petroleum if he deemed it advisable. Defendant delayed the message, so that it was delivered to the broker several hours late, as a result of which the broker could not purchase on exchange until the next day. Meanwhile, the price had risen, so that the broker did not think it best to purchase. Plaintiff is entitled to no damages other than the cost of transmitting the message. "Here the plaintiff did not purchase the oil ordered after the date when the message should have been delivered, and therefore was not required to pay, and did not pay, any advance upon the market price prevailing at the date of the order; neither does it appear that it was the purpose or intention of the sender of the message to purchase the oil in the expectation of profits to be derived from an immediate resale. If the order had been promptly delivered on the day it was sent, and had been executed on that day, it is not found that he would have resold the next day at the advance, nor that he could have resold at a profit at any subsequent day."[12]

4. Plaintiff, a passenger on defendant's trolley car, was injured by an explosion caused by a defective controller negligently used by defendant. Recovery is sought for both present and prospective injuries. She cannot recover for merely possible prospective injuries, but she can recover for prospective injuries likely to result. " 'Certainty' is freedom from doubt, and if a plaintiff is required to prove that future apprehended consequences are reasonably free from doubt, he has imposed upon him a burden far beyond the ordinary requirement of proof in

11—Griffin v. Colver, (1858) 16 N. Y. 489, 69 Am. Dec. 718.

12—Western Union Tel. Co. v. Hall, (1888) 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. 577.

a civil action and approximating closely to the proof beyond a reasonable doubt of the criminal action."[13]

5. A negligently left gaps in his fence, and B negligently failed to fence his own property. Depredations upon B's property by cattle resulted, partly from the negligence of each party; but the testimony failed to show what part of the damage was due to B's negligence. A cannot recover of B.[14]

6. Because of the failure of A to pay a certain sum of money when due, B loses the opportunity to make investments in the market. B cannot recover for this loss. Whether he would have made or lost money if the payment had been made, is uncertain.[15]

7. A contracts to deposit a certain sum of money with B, to be applied on furniture which A is to purchase when he gets married. A does not make the deposit and does not marry. No damages can be measured here. It is not certain how much B is damaged or whether he is damaged at all by A's failure to deposit.[16]

8. Defendant so negligently operated its locomotive that dense smoke and vapors fell upon, and went through, plaintiff's dwelling-house, causing damage to the house and its contents. The fact that it is impossible to say just how much of the damage was caused by negligent firing and how much was the necessary result of the operation of a railroad, does not make the damages so uncertain as not to be recoverable.[17]

9. Plaintiff's lands were flooded, which was due partly to the acts of defendant and partly to natural causes. Plaintiff may recover. "It seems to be obvious that all water which flows on plaintiff's land must necessarily occasion damage to him. There is no reason in saying that, because his land would be overflowed in the natural condition of that water, that no harm is done in augmenting such inundations. The larger the augmentation of water, it would seem, the greater the injury would be by reason

13—Johnson v. Connecticut Co., (1912) 85 Conn. 438, 83 Atl. 530.

14—Hightower v. Henry, (1905) 85 Miss. 476, 37 So. 745.

15—Greene v. Goddard, (1845) 9 Metc. (Mass.) 212.

16—Katz v. Wolf, (1896) 37 N. Y. Supp. 648, 16 Misc. 82.

17—Jenkins v. Pennsylvania R. Co., (1902) 67 N. J. Law 331, 51 Atl. 704, 57 L. R. A. 309.

of such increase. It is a question for the good sense of the jury."[18]

10. Cattle, of which part belonged to defendant and part to others, trespassed on plaintiff's land and destroyed his corn. Plaintiff may recover substantial damages. "In cases of this sort, entire accuracy is impossible. The jury had a right to consider from the evidence how much corn had been destroyed, and what proportion of the cattle in the field were turned in by the defendant, and thus arrive at as near an estimate of the damages as the nature of the case would permit."[19]

11. Defendant cast refuse material out of his sawmill into a stream, from which a freshet carried it to the plaintiff's land. Plaintiff may recover. "The difficulty may be great of accurately proportioning and assessing the damages done by the defendant, but that difficulty the defendant would have avoided had he taken care that no occasion should arise requiring such assessment of damages."[20]

12. Defendant city's pumping-station was so operated as greatly to lower the water level of plaintiff's land and diminish its productive capacity. "A plaintiff is entitled to damages for the diminution of the productive value of the property occasioned by the trespass, and upon evidence showing the nature, character, and extent of the business of cultivating the property interrupted or diminished by the trespass plaintiff is entitled to have an assessment of damages, even if, upon the evidence, it is very difficult to reach a satisfactory result."[21]

13. A water company contracted with a city to keep fire hydrants constantly supplied with water under sufficient pressure for effective fire services. This it failed to do. The damages for this breach were difficult to assess, "but mere difficulty in assessing damages is no reason for denying them to a party who has a right to compensation as a substitute for that which he was entitled to receive, but of which he has been deprived by the default of another. * * * The damages in such a case must

18—Phillips v. Phillips, (1870) 34 N. J. Law 208. Accord: Chicago & N. W. Ry. Co. v. Hoag, (1878) 90 Ill. 339.

19—Ogden v. Lucas, (1868) 48 Ill. 492.

20—Washburn v. Gilman, (1874) 64 Me. 163, 18 Am. Rep. 246.

21—Dinger v. City of New York, (1903) 86 N. Y. Supp. 577, 42 Misc. 319; affirmed in memorandum decision, (1905) 182 N. Y. 542, 75 N. E. 1129.

be assessed in such reasonable amounts as, in the judgment of the court or jury, the evidence warrants."[22]

14. Defendant, upon the purchase of certain "beautifiers for women" by plaintiffs, agreed to print plaintiff's names at the bottom of all defendant's advertisements in the Detroit newspapers as carrying defendant's preparations for sale. Defendant, after eight months, ceased so to print plaintiff's names, and inserted instead the name of another house as wholesale agents in Detroit. Judgment for defendant. "The injury suffered, if any, was a loss of such profits as would have resulted from advertising—a matter of mere conjecture, depending upon the number who might read and act upon the advertisement."[23]

15. Plaintiff was injured through the negligence of defendant village, and was compelled to cease his work of buying teas, so that there was a great falling off in the amount of business done by his firm. Held, that profits lost through the injury cannot be recovered. "These profits depend upon too many contingencies, and are altogether too uncertain to furnish any safe guide in fixing the amount of damages."[24]

16. A contracted to procure an assignment of certain stock to B, but failed to do so. The evidence tended to show that the stock was worth its face value of $4,000. There is no such uncertainty as to prevent recovery for the breach.[25]

17. Plaintiff agreed to perform certain services for defendant, in consideration of which defendant promised to pay plaintiff $5,000 and six per cent preferred stock in a certain corporation to be organized, to the par value of $100,000. Plaintiff performed the services, and the corporation was organized, but it did not issue any preferred stock, for which reason there was no market value of such stock ascertainable. Plaintiff's damages resulting from the breach of the contract to transfer him the stock, are not too uncertain to be recoverable.[26]

22—First National Bank of Minneapolis v. St. Cloud, (1898) 73 Minn. 219, 75 N. W. 1054.

23—Stevens v. Yale, (1897) 113 Mich. 680, 72 N. W. 5.

24—Masterton v. Mt. Vernon, (1874) 58 N. Y. 391. See also Howe Mach. Co. v. Bryson, (1876) 44 Ia. 159, 24 Am. Rep. 735.

25—First National Bank of Waterloo v. Park, (1902) 117 Ia. 552, 91 N. W. 826.

26—Crichfield v. Julia, (1906) 147 Fed. 65, 77 C. C. A. 297. In such a case, the property to be delivered having no market value, its real value is determined by considering other facts. Among these

18. Plaintiffs contracted to furnish defendants with "whatever quantities of silicate of soda they will require to use in their factories during one year from date" at the price of $1.10 per 100 pounds. Two hundred and fifty barrels of the article were delivered under the agreement, when defendants notified plaintiffs that they would not receive any more. During the balance of the year referred to in the contract, the defendants used about 2,877 barrels of the article, which they purchased of other parties. Silicate of soda is not on sale in the market, so that there is no market value. Plaintiffs may recover profits which they would have made under the contract.[27]

19. Defendants, contractors, in constructing an underground street railroad in front of plaintiff's hotel, erected a structure which was a nuisance, preventing plaintiff from receiving a normal amount of rental for his rooms, and diminishing the amount of receipts from the restaurant business in connection with the hotel. Held, that, under the circumstances proved, the losses of the plaintiff were sufficiently certain to be recoverable. The amount of the business done before the beginning of the nuisance, the amount done during its continuance, and the amount done after its cessation, are competent to show what damage was done. "What the law requires is the best and most certain proof that it is possible to supply, and such proof we have in this case."[28]

20. Defendant contracted to transmit and deliver a telegram for plaintiff, to a third party, announcing her husband's death, stating that she would arrive at 6 A. M. with the corpse, and requesting him to tell Thomas, one of her husband's relatives. Defendant negligently changed the name of the sender from "Edith Cowan" to "Edith Erwin," so that the receiver knew nothing of the meaning of the message, and so did not comply with the request. Plaintiff arrived with the corpse and had to wait three or four hours, until her friends had been notified. She asks damages for mental suffering. Held, that claims of this nature will not be disallowed merely "because of the impossi-

facts is the market value of the corporation's property. Hewitt v. Steele, (1893) 118 Mo. 463, 24 S. W. 440.

27—Todd v. Gamble, (1896) 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225.

28—Bates v. Holbrook, (1904) 85 N. Y. Supp. 673, 89 App. Div. 548.

bility of providing any exact standard or measure of compensation for injured feelings."[29]

21. Defendant committed an assault and battery on plaintiff, a theatrical performer, by reason of which plaintiff lost time and professional gains. Some difficulty was experienced in arriving at a fair measure of damages for such loss, as the defendant performed jointly with his wife. Inability to compute damages with accuracy, is no reason why the jury should not get such information as may be had. A wrong-doer must bear the risk of failure to reach an exact result, "because it is not the plaintiff's fault that the inquiry has become necessary. Where no better means can be had, the jury must use their best judgment, and it is presumed that counsel will urge before them all considerations which will aid them in avoiding injustice."[30]

22. The defendant, by false representations, induces the plaintiff to lease a certain parcel of land, close to the entrance to certain centennial exposition grounds, for a restaurant. The evidence showed that it was very uncertain whether plaintiff would have profited or lost by the venture if defendant's representations had been true, as others in similar ventures at this exposition had lost money. Plaintiff's damages are too speculative to be recoverable.[31]

29—Cowan v. Western Union Telegraph Co., (1904) 122 Ia. 379, 98 S. W. 281, 64 L. R. A. 545, 101 Am. St. Rep. 268.

30—Welch v. Ware, (1875) 32 Mich. 77.

31—Myers v. Turner, (Tenn. 1898) 52 S. W. 332.

CHAPTER VII

Entire and Prospective Damages [1]

25. **In General.**—One of the most important and unfailing principles of the law of damages is that one injury gives rise to only one right of action. Past and future damage growing out of one injury must be compensated for in one action.[2] It is safe to say that no carefully reasoned judicial opinion has ever violated this principle. At first glance, some cases will seem to the student to be exceptions to the general rule; but such cases are only apparently, and not actually, outside the operation of the rule, as we shall see. Neither in contract nor in tort can more than one action be brought for one injury. The useless splitting up of a right of action is not tolerated by the courts. Occasionally, the rule works a seeming injustice, as in a case of personal injury, where, after the plaintiff gets judgment against the wrongdoer, there accrue proximate consequences more serious than any that were known or anticipated at the time of the trial; but the rule is a necessary one, and in the main just.

In contract, damages assessed once for all, in compensation for all losses past and future, are known as entire damages; and, in tort, damages for future loss are called prospective damages.

1—For a more comprehensive discussion of this subject as affecting torts to realty, see Chapter XL.

2—Tort: Powers v. City of Council Bluffs, (1877) 45 Ia. 652, 24 Am. Rep. 792; Stodghill v. Chicago, B. & Q. R. Co., (1880) 53 Ia. 341, 5 N. W. 495: Hargreaves v. Kimberley, (1885) 26 W. Va. 787, 53 Am. Rep. 121.

Contract: Galt v. Provan, (1906) 131 Ia. 277, 108 N. W. 760; Fish v. Folley, (1843) 6 Hill (N. Y.) 54.

26. **Continuing Wrongs and Series of Wrongs.**—The apparent, but not real, exceptions to the general rule that a plaintiff cannot have more than one action for one injury, are cases of continuing wrongs or of series of wrongs. The too loose use of the term "continuing wrong" is unfortunate, as a more accurate expression would, in many instances, be "series of wrongs;" for a continuing wrong is sometimes really a chain of wrongs, alike in their nature and traceable to one beginning. Where an injury is of such a kind as to be complete without proof of damage, as in an ordinary case of trespass to realty, the act of the defendant, being wrongful, gives rise at once to a right of action in the plaintiff, and all damage, past and future, is compensated for in the one action.[3] Greater difficulty arises where the defendant has done an act not wrongful in itself, from which a number of events in a series occur as proximate results, each bringing damage to the plaintiff and each constituting a cause of action. Such a case is that of A's withdrawal of a part of the soil of his own land, depriving B's land of its natural support. The withdrawal of the support is not of itself wrongful and gives B no right of action. Just as soon as B's land is actually damaged by the excavation, and no sooner, B has a right of action. At the first subsidence of his land, he can maintain his first action. Then, if B's land again subsides from time to time, as a result of the excavation, B can bring new and successive actions just as frequently as a subsidence adds to his damage.[4] Each subsidence completes a new

3—"The adjudged cases are agreed as to the abstract rule that, where the injury wholly accrues and terminates when the wrongful act causing it is done, there can be but one action for the redress of the injury. But, where the injury is in the nature of a continuing trespass or nuisance, successive actions may be maintained for the recovery of the damages as they accrue. In the application of the rule, however, the authorities are somewhat conflicting."—Bowers v. Mississippi, etc., Boom Co., (1899) 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395.

4—"No one will think of disputing the proposition that for one cause of action you must recover

cause of action. The series of losses thus resulting to the defendant really constitutes a series of wrongs; and it cannot be properly said that either the original act of the defendant or the resulting series of losses comprises a continuing wrong, the defendant's act not being of itself wrongful at all, and the series of losses constituting, not a continuing wrong, but a series of wrongs and therefore a series of rights of action. If it were not true that each one of such losses is, in legal contemplation, an injury of itself, no new action for a new loss would lie after the maintenance of an action for a loss earlier in the series.

Where the defendant has committed upon the plaintiff a battery, which constitutes but one wrong, and the plaintiff has sued and recovered damages, and a piece of bone later falls out of the plaintiff's skull as a result of the

all damages incident to it by law once and forever. A house that has received a shock may not at once shew all the damage done to it, but it is damaged none the less then to the extent that it is damaged; and the fact that the damage only manifests itself later on, by stages, does not alter the fact that the damage is there. And so of the more complex mechanism of the human frame; the damage is done in a railway accident; the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained.

"But the words 'cause of action' are somewhat ambiguously used in reasoning upon this subject. What the plaintiff has a right to complain of in a court of law in this case is the damage to his land, and by the damage I mean the damage which had in fact occurred; and, if this is all that a plaintiff can complain of, I do not see why he may not recover toties quoties fresh damage is inflicted.

"* * * I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action, for which damages may be recovered. I cannot concur in the view that there is a breach of duty in the original excavation."—Lord Halsbury, in Darley Main Colliery Co. v. Mitchell, (1886) 11 App. Cas. 127.

See New Salem v. Eagle Mill Co., (1884) 138 Mass. 8; and McConnel v. Kibbe, (1864) 33 Ill. 175, 85 Am. Dec. 265.

battery, the plaintiff cannot maintain a second action.[5] His first action has exhausted his right.

27. **Torts Having More Than One Aspect.**—Sometimes a tort has, to the plaintiff, more than a single aspect, affecting him as to his person and as to his property, or injuring two different pieces of his property; but this fact does not give him two separate rights of action. Where a plaintiff has, as a result of the same wrong, suffered damage both to his person and to his property, it is generally held that he has only one cause of action. He cannot bring one suit for his personal injury and later maintain a suit for the injury to his property.[6] Where the defendant has converted property of the plaintiff, the latter cannot first maintain one action for the value of the property and later maintain another action for special damages, based upon the same conversion.[7] So, strictly on principle, where the plaintiff has sued one of two joint converters and recovered against him, the plaintiff is barred from maintaining a subsequent action against both converters.[8] Where the defendant has negligently burned timber growing on two lots belonging to the plaintiff, by one act, the plaintiff has only one cause of action.[9] By merely calling one offense by two different names, a plaintiff cannot maintain two actions for the one wrong. For instance, where the

5—Fetter v. Beale, (1799) 1 Ld. Raym. 339.

6—Doran v. Cohen, (1888) 147 Mass. 342, 17 N. E. 647; King v. Chicago, M. & St. P. Ry. Co., (1900) 80 Minn. 83, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238.

Contra: Brundsen v. Humphrey, (1884) 14 Q. B. D. 141, 53 L. J. Q. B. 476, 51 L. T. 529, 32 W. R. 944; Reilly v. Sicilian Asphalt Paving Co., (1902) 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176, 88 Am. St. Rep. 636; Watson v. Texas & P. Ry. Co., (Tex. Civ. App. 1894) 27 S. W. 924.

7—Sullivan v. Baxter, (1889) 150 Mass. 261, 22 N. E. 895.

8—Bennett v. Hood, (1861) 1 Allen (Mass.) 47, 79 Am. Dec. 705.

9—Knowlton v. New York, etc., R. Co., (1888) 147 Mass. 606, 18 N. E. 580; Sullivan v. Baxter, (1889) 150 Mass. 261, 22 N. E. 895.

defendant has enticed and carried away the plaintiff's wife, plaintiff cannot maintain two separate actions, one an action on the case for enticing her away, and the other an action of trespass for carrying her away.[10] Likewise, where the value of goods has been recovered in trover, assumpsit for the value of the same goods will not lie.[11]

28. **Entire Damages.**—In contract, entire damages cannot be assessed unless there has been an entire breach. If a contract is a divisible one, so that the contractor is bound to do a series of acts independent of one another, upon breach as to one of the acts, the other party may sue and recover damages, and subsequently a new right of action accrues upon each subsequent and separate breach.[12] However, "a continuous running account be-

10—Gilchrist v. Bale, (1839) 8 Watts (Pa.) 355, 34 Am. Dec. 469.

11—Agnew v. McElroy, (1848) 10 Smedes & Mar. (Miss.) 552, 48 Am. Dec. 772.

12—Curry v. Kansas & C. P. Ry. Co., (1897) 58 Kan. 6, 48 Pac. 579. "It is undoubtedly true that only one action can be maintained for the breach of an entire contract, unless, by the terms of it, it is in its nature divisible. But if one contracts to do several things, at several times, an action of assumpsit lies upon every default; for, although the agreement is entire, the performance is several, and the contract is divisible in its nature. Thus, on a note or other contract payable by installments, assumpsit lies for non-payment after the first day; or where interest is payable annually, the payment of the principal being postponed to a future time, assumpsit lies for the non-payment of interest, before the principal becomes due and payable. In all such cases, although the contract is in one sense entire, the several stipulations as to payment and performance are several, and are considered, in respect to the remedy, as several contracts. This principle has long been well settled, although the law in this respect has been very much modified by modern decisions. * * *

"A contract to do several things, at several times, is divisible in its nature; and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a several contract. * * *

"As the law is, we think it can not be maintained, that a running account for goods sold and delivered, money loaned, or money had and received, at different times, will constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing, from which such an agreement or un-

tween the same parties, is an entire thing, not susceptible of division, the aggregate of all the items being the amount due. If this is not so, then each item of which the account is composed is a separate debt for which the party may sue." [13]

CASE ILLUSTRATIONS

1. Defendant, operating a mill, so placed a large exhaust steam pipe that the steam was ejected with force into plaintiff's residence, causing an excessive amount of moisture in plaintiff's home, so that the house became mouldy and damp, and plaintiff contracted asthma and rheumatism. "It is urged that plaintiff's instruction on the measure of damages was erroneous, in that it allowed a recovery for future as well as past suffering. But the petition included that, and the evidence showed she had not recovered, and the jury were told that before they could include future suffering, they must find that she had not recovered, which would make future suffering, not only probable, but certain." [14]

2. Defendant railroad company committed a wrong amounting to a permanent injury to plaintiff's mill, by diminishing the water power. "In the instant case the measure of damages is the difference between the market value of the mill property before and after the injury. As the assessment is to be made now of the damages to flow from permission to take the water in the future, the evidence should be confined to the market value, at the present time, of the plaintiff's mill property with an undisturbed flow of water, and with the flow disturbed as proposed by the defendant." [15]

3. A railway company contracts to issue passes annually to

derstanding may be inferred. No such agreement, or course of dealing, is set up in this case, and consequently, the defendant's plea, that the cause of action in this suit is identical with that of the former action, can not be maintained."—Badger v. Titcomb, (1834) 15 Pick. (Mass.) 409, 26 Am. Dec. 611.

13—Oliver v. Holt, (1847) 1 Ala. 574, 46 Am. Dec. 228; Bendernagle v. Cocks, (1838) 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

14—Strumph v. Loethen, (Mo. App. 1918) 203 S. W. 238.

15—Norfolk & W. Ry. Co. v. A. C. Allen & Sons, (Va. 1918) 95 S. E. 406.

X, for life. Held, that this contract is divisible, and may be sued on annually, upon each breach.[16]

4. A agreed to supply B with 20 bales of hops per month, from October to February, for five years. Before the completion of the contract, A elected not to perform. Held, that B can, upon this refusal to perform, maintain one action for damages for "what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably have availed himself."[17]

16—Curry v. Kansas & C. P. Ry. Co., (1897) 58 Kan. 6, 48 Pac. 579.

17—Roehm v. Horst, (1900) 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780.

CHAPTER VIII

Excessive and Inadequate Damages

29. Verdict May Be Set Aside for Excessiveness or Inadequacy of Damages.—Usually a court is slow to set aside a verdict on the ground that the damages allowed are excessive or that they are inadequate. Especially reluctant is a court to set aside as excessive or inadequate a verdict in a case wherein the exact or approximate amount of damage is difficult to determine.[1] A court is

1—In Huckle v. Money, (Common Pleas, 1763) 2 Wilson 205, 95 Eng. Repr. 768, Lord Chief Justice Pratt said: "In all motions for new trials, it is as absolutely necessary for the court to enter into the nature of the cause, the evidence, facts, and circumstances of the case, as for a jury; the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; torts or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, etc., the state, degree, quality, trade, or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by a jury in giving damages; the few cases to be found in the books of new trials for torts show that courts of justice have most commonly set their faces against them; and the courts interfering in these cases would be laying aside juries; before the time of granting new trials, there is no instance that the judges ever intermeddled with the damages."

See also Terre Haute, etc., R. Co. v. Vanatta, (1859) 21 Ill. 188, 74 Am. Dec. 96.

"In determining whether a verdict is excessive, each case must be governed by its own facts and circumstances."—8 R. C. L. 675.

"In determining whether or not a verdict in an action for personal injuries, or other personal tort, is excessive, the court will consider all the circumstances; for example, the nature and extent of the injury, whether or not it is permanent, the amount of suffering which the plaintiff has endured in consequence of the injury, the probability of future pain and suffering, the expenses which he has been

less ready to interfere where the damages are nonpecuniary than where they are pecuniary, as it is harder to say that damages for a non-pecuniary injury are too much or too little. Yet there are many cases in which damages were non-pecuniary, but in which the jury found a verdict for damages so clearly excessive or inadequate, that the court set the verdict aside.[2] Where the amount of damage is easily stated or approximated, a court can, with more reason, say that the amount of a verdict is excessive or inadequate.[3] If a verdict has been rendered for an amount so large that it could not possibly have been arrived at by a proper assessment of damages for the various elements of injury in the case,

compelled to incur, and the extent to which his earning power has been diminished or permanently impaired. Consideration will also be given to such matters as the age of the plaintiff, his expectancy of life, and the amount of his previous earnings.''—8 R. C. L. 678.

''If there is a legal measure of damages which the jury have deviated from, by finding either less or more than the plaintiff is entitled to by a preponderance of the evidence, the trial court, in the exercise of discretion, will entertain a motion for a new trial on behalf of the party injured by the finding. So if the jury assess damages not warranted by the declaration, the verdict will be set aside, and the court may do it ex officio. Where there is not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not, ordinarily, interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the court; and the law does not recognize in the latter the power to substitute its own judgment for that of the jury.'' Sutherland on Damages, § 459.

2—Peterson v. Western Union Tel. Co., (1896) 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

3—Phillips v. London & S. W. R. Co., (1879) L. R. 4 Q. B. D. 406; in which the court is led to the conclusion, not only that the damages are inadequate, but that the jury must have omitted to take into consideration some of the elements of damage which ought to have been taken into account. A considerable part of the damage in this case was pecuniary and easily calculable, so that the court could more easily set aside the verdict than if the damage had been wholly or almost wholly non-pecuniary. The amount of the verdict, £7,000, considered by itself, was large; so that, if it had been largely for non-pecuniary elements, it would not have been very likely to be set aside as inadequate.

the verdict is set aside.[4] Likewise, if the verdict is for the plaintiff, but is for so small a sum as to make it clear that the jury has not given proper consideration to all elements of damage in the case, the court sets aside the verdict.[5] In either of these cases, the verdict is against the law and the evidence and is regarded as indicating passion, prejudice, or ignorance on the part of the jury. As is well said by McClain, J., in Tathwell v. City of Cedar Rapids,[6] "The right of jury trial, as uniformly recognized under the common law system, involves the determination by the jury, rather than by the judge, of questions of fact, including the amount of damages to be given where compensation is for an unliquidated demand. Nevertheless, the trial courts have exercised from early times in the history of the common law the power to supervise the action of the jury, even as to the measure of damages, and to award a new trial where the verdict is not supported by the evidence and is manifestly unjust and perverse. And while it is uniformly held that the trial judge will interfere with the verdict of the jury as to matters of fact with reluctance, and only where, on the very face of the evidence, allowing every presumption in favor of the correctness of the jury's action, it is apparent to a reasonable mind that the verdict is clearly contrary to the evidence, yet the power of the judge to interfere in extreme cases is unquestionable. It has sometimes been said that the judge should not interfere where the verdict is supported by a scintilla of evidence; but the scintilla doctrine has been discarded in this state, and is not now generally recognized elsewhere." In

4—Peterson v. Western Union Tel. Co., supra; Wood v. Gunston, (King's Bench, 1655) Style's Reports 466, 82 Eng. Repr. 867.

5—Carter v. Wells, Fargo & Co., (1894) 64 Fed. 1005. See also Phillips v. London & S. W. R. Co., (1879) L. R. 4 Q. B. D. 406.

In some jurisdictions, statutes prohibit the granting of new trials on account of inadequacy of damages in actions for injury to the person or reputation. See note, 8 Ann. Cas. 907.

6—(1903) 122 Ia. 50, 97 N. W. 96.

most cases, the trial judge tries to prevent the rendering of a verdict for excessive or inadequate damages, by giving proper instructions on the measure of damages.

But the court will not disturb the verdict by reason of the amount thereof, unless it is so grossly excessive or inadequate as to indicate passion or prejudice or ignorance on the part of the jury.[7]

The mere fact that the court would have given a considerably larger verdict than the jury has given, or the fact that the evidence would have warranted much larger damages, does not warrant the court in setting aside the verdict.[8]

It is usually exceedingly difficult to induce a court to declare damages in a negligence case to be so inadequate as to justify the interference of the court, but sometimes the verdict is so clearly inadequate as to evince just as much prejudice as could ever be shown by an excessive verdict.[9]

For an unjustifiable and intentional assault and battery, the plaintiff is not restricted to nominal damages; and a verdict for one dollar is, in such a case, so clearly inadequate as to justify setting it aside, even if the

7—Florence Hotel Co. v. Bumpus, (1915) 194 Ala. 69, 69 So. 566, Ann. Cas. 1918 E 252.

8—Lancaster v. Providence & S. S. S. Co., (1886) 26 Fed. 233.

9—"In negligence cases the court is averse to increasing the verdicts of juries, who rarely underestimate damages; but when the jury has failed to do justice, the court, in the exercise of its jurisdiction, must do it."—Ford v. Minneapolis St. Ry. Co., (1906) 98 Minn. 96, 107 N. W. 817, 8 Ann. Cas. 902, citing Sullivan v. Vicksburg, etc., R. Co., (1887) 39 La. Ann. 800, 2 So. 586, 4 Am. St. Rep. 239. The student should notice, however, that, according to the procedure in most jurisdictions, the court would not increase the damages, but would merely grant a new trial. Likewise, in cases wherein the jury has given excessive damages, the usual procedure is to grant a new trial; but, in some jurisdictions, it is a common practice for the court to permit a verdict for excessive damages to stand, on the condition that the plaintiff consent to remit a certain portion of the amount. If the plaintiff does not so consent, the verdict is set aside and a new trial granted.

plaintiff has not had to consult a physician or to lose time.[10]

30. **Second Trial.**—A jury has no right to consider the fact that the trial being held is the second one in the cause. Juries sometimes seem to increase damages by reason of the fact that the plaintiff is obliged to carry the matter through more than one trial in order to get damages, but this they have no right to do.[11]

31. **Effect of the Modern Tendency Toward High Prices.**—It would seem only natural and logical that, with the gradual and general, not to say universal, increase in prices during recent years, larger and larger verdicts should be allowed to stand in many kinds of cases; and this is the tendency. For instance, in a personal injury case, all of the pecuniary elements are larger in amount now than formerly. Physicians' and nurses' services, hospital accommodations, drugs, and any other things essential to proper treatment of a personal injury, have advanced in cost. The plaintiff's wages and earning power lost are worth much more, in terms of money, than they would have been a few years ago. The same is true in regard to property wrongfully taken or injured. In no field must more allowance be made for the fact that a case cited is old. Some of the judicial statements of forty years ago as to the high value of money, and the extreme reluctance of courts of that time to cause much money to change hands in the form of damages, read today like antiquarian curiosities.[12]

10—Ford v. Minneapolis St. Ry. Co., (1906) 98 Minn. 96, 107 N. W. 817, 8 Ann. Cas. 902.

11—Davis v. McMillan, (1905) 142 Mich. 391, 105 N. W. 862, 3 L. R. A. (N. S.) 928, 7 Ann. Cas. 854, 113 Am. St. Rep. 585.

12—E. g., Chicago, R. I. & P. R. Co. v. Payzant, (1877) 87 Ill. 125, in which it is said: "Twenty-five hundred dollars is a very large sum of money, which few men or women accumulate in a lifetime." How extremely out of accord with present economic conditions!

The fact that the money value

32. **Excessive Exemplary Damages** stand on a footing similar to that of excessive compensatory damages, not being sustainable if so large as not to be warranted by all the circumstances of the case. In deciding whether such damages are excessive, the court must consider the amount of actual damage, the circumstances of aggravation such as the degree of malice shown by the wrongdoer, and the wealth of the defendant. As the punitive element is not pecuniary and is not, in most jurisdictions, compensatory, it is not usually easy to induce a court to set aside as excessive a verdict for exemplary damages. "In assessing such damages, the jury should consider the aggravating and mitigating circumstances, and may refuse to award any exemplary damages; but if, in their judgment, such damages should be given, then the amount thereof is left to their discretion, subject, however, to the approval of the court, and if, in the judgment of the court, the damages awarded are too much, a remittitur may be required or a new trial ordered." [13]

CASE ILLUSTRATIONS

1. Plaintiff, upon becoming a passenger in a first-class coach of defendant, found all seats occupied, although not all were being used as seats. The conductor refused to see that a seat for plaintiff was vacated, accompanying his refusal with profanity. Judgment for plaintiff for $75 affirmed. "That a jury awarded the trivial sum complained of is proof positive that no undue prejudice existed against the corporation. Let the company thank God, and take courage." [14]

of life and health is appreciating and the earning capacity of money is steadily depreciating is a factor to be considered in determining whether or not a verdict for death is excessive, and the result of passion and prejudice on the part of the jury. Northern Trust Co. v. Grand Trunk Western R. Co., (1917) 207 Ill. App. 11, reversed on another point, (1918) 282 Ill. 565, 118 N. E. 986.

13—Summers v. Keller, (1911) 152 Mo. App. 626, 133 S. W. 1180. See also article by writer, "Excessive Exemplary Damages—The Relation of Exemplary to Compensatory Damages," 52 American Law Review 11.

14—Louisville, N. O. & T. Ry.

2. Plaintiff, 28 or 29 years old, was able to work at his usual wages less than two months after his injury in question. His permanent injuries were: an injured hand, some of the bones of his left hand being broken; a large gash over his left eye, without any evidence of a broken bone; an injury to the back of his head; and some impairment of sight in one eye, largely remedied by the use of glasses. He also suffered slight temporary mental derangement for a little less than three years, and a temporary injury to his ankle and knees. Held, that a verdict for $24,000 is grossly excessive and necessarily given under the influence of passion and prejudice, and that it is unconscionable to the extent of more than half that sum.[15]

3. A university graduate in electrical engineering, 23 years old, healthy, intelligent, working as a lineman, was injured through the negligence of the defendant. A large amount of electricity passed through his body, making the muscles of a part of his body rigid, and later there developed involuntary shaking and jerking of the muscles of the arm, leg, and head, with pain and soreness. A condition of traumatic neurasthenia developed. His condition improved, but an unreasoning dread of high-tension wires developed, which was likely to interfere with his work in his chosen profession. A verdict of $7,500 is not excessive.[16]

4. Two of plaintiff's ribs were broken, and he suffered a contusion of hip and ankle. No permanent injury was shown. Held, that a verdict of $250 was not inadequate, though small.[17]

5. "Plaintiff was knocked senseless, his ear was cut in two, he received a severe gash on his head, his face was mashed and bruised, and his leg was severely sprained. After recovering consciousness, he was seized with vomiting, which continued for several hours. He was laid up for several days, suffering great pain, and incurring expenses for board and medical treatment, and did not fully recover for some weeks. It is absurd to consider this verdict of $100 as affording reparation for such

Co. v. Patterson, (1891) 69 Miss. 421, 13 So. 697, 22 L. R. A. 259.

15—Roberts v. Pacific Telephone, etc., Co., (1916) 93 Wash. 274, 160 Pac. 965.

16—Summerskill v. Vermont Power, etc., Co., (Vt. 1917) 99 Atl. 1017.

17—Lanier v. Hammond Lumber Co., (1917) 141 La. 829, 75 So. 738.

injuries. Indeed, it would scantily compensate the trouble and expense of the lawsuit which he was compelled to bring in order to vindicate his rights. We think an addition of $500 to the verdict will mete out only moderate justice."[18]

18—Sullivan v. Vicksburg, etc., R. Co., (1887) 39 La. Ann. 800, 2 So. 586, 4 Am. St. Rep. 239.

CHAPTER IX

Liquidated Damages and Penalties

33. **In General.**—Liquidated damages are damages settled upon as a stated sum, to be paid to one of the parties to a contract as compensation for a breach by the other party. Where a sum named is construed by a court as being liquidated damages, such sum is the amount of recovery for a breach.[1]

A penalty, which differs in its nature very widely from liquidated damages, is a sum named in a contract, to be paid by a defaulting party as punishment for his breach. Unlike liquidated damages, a penalty is not regarded as constituting an agreed measure of compensation; it is considered as a punishment agreed upon beforehand. The practical purpose of the parties in naming such a sum, is to make the agreement for the penalty a kind of security for the performance of the contract.[2] If their purpose is to make a penal sum absolutely due *in toto* in case of breach, their purpose will not be given effect; a sum which would, on principles to be stated hereafter, be unreasonable and unconscionable, will not be in any way determinative of the amount to be assessed for a breach. A court does not feel itself compelled to regard a penalty as being either the *maximum* or *minimum* amount to be assessed for a breach, where the penalty is named in a mere contract, although it is regarded as the

1—Lowe v. Peers, (1768) 4 Burr. 2225, 98 Eng. Repr. 160.

2—"A penalty, in contradistinction to liquidated damages, is a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for the actual damages which may be sustained by reason of nonperformance."—19 Am. & Eng. Enc. of Law (2d ed.) 395.

maximum of liability, where it is named in a penal bond. Where a sum named in a contract is construed by a court as being a penalty, it cannot be collected in full as a stated compensation; only damages for the actual loss occasioned by the default will be assessed, whether such damages be greater or less than the penalty named.[3] Where a penalty is named in either a statutory undertaking[4] or a penal bond, the sum so named is the limit of recovery; and, while a lesser amount may be recovered on the bond, a greater cannot be.[5]

34. **Language Not Conclusive.**—Where a sum is named as "liquidated damages," it may be held to be a penalty, despite the words of the parties;[6] and, even where the

3—"Before the passage of 8 & 9 Wm. III, in an action of debt on an agreement, performance of which was secured by a penalty, the recovery was for the entire penalty. Relief was solely in equity, and originally was only granted in cases of fraud, extremity, or accident. The effect of this statute was to put actions for the recovery of penalties for default in the performance of agreements on the same basis as actions directly upon the agreement to recover damages, with respect to the quantum of recovery; in other words, to provide substantially the same measure of relief in an action at law as the defendant might have obtained in a court of equity."—13 Cyc. 89.

4—Common examples of statutory undertaking are: the bond given by a plaintiff in an injunction suit, as security to the defendant for damages caused by the issuance of an interlocutory injunction, such damages, within the amount of the penalty, to be collected by the defendant if the injunction is found to have been wrongfully issued; and the bond given for a very similar purpose in attachment or replevin.

5—Wood v. State, (1886) 66 Md. 61, 5 Atl. 476; Fraser v. Little, (1865) 13 Mich. 195, 87 Am. Dec. 741. The latter case says, in regard to a replevin bond: "This statute, I think, fixes the limit of the sureties' liability, so that in executing a bond as surety, we must understand that he intends and only undertakes to become liable to the extent of the penal sum mentioned, and no further, and that the statute requires nothing more from him."

See also Parit v. Wallis, (1796) 2 U. S. 252, 1 L. ed. 370.

6—Grand Tower Co. v. Phillips, (1874) 23 Wall. (U. S.) 471, 23 L. ed. 71; Wyman v. Robinson, (1882) 73 Me. 384, 40 Am. Rep. 360; Wheatland v. Taylor, (1883) 29 Hun (N. Y.) 70.

"The name by which it is called is of but slight weight."—Kunkle

sum is agreed upon "as liquidated damages, and not as a penalty," the court does not feel itself bound to give effect to the stipulation as for liquidated damages, and so may call the sum a penalty.[7] The use of the term "penalty" in a contract is not conclusive;[8] but it seems to be more nearly conclusive than does the use of the term "liquidated damages."[9]

The terms "forfeit" and "forfeiture" are sometimes construed as for penalties,[10] and sometimes as for liquidated damages.[11] These and all other terms used in this connection, are not in themselves conclusive as to their intended meaning or as to the effect given them by a court. Circumstances play a part here, just as where the terms "penalty" and "liquidated damages" are used; and the intention of the parties must be gathered not only from the contract itself, but from circumstances. Furthermore, since not only the intention of the parties is relevant, but the reasonableness of any amount stated as liquidated damages, as we shall see, is also in issue, mere words are far from being the determining factor.

35. Liquidation of Damages Limited in Its Effect, According to the Agreement of the Parties.—Where the parties stipulate damages, the effect of their stipulation is limited to those contingencies which they have within their contemplation. Their stipulation of certain liquidated damages in the event of a breach, will not be of ef-

v. Wherry, (1899) 189 Pa. 198, 42 Atl. 112.

7—Chicago House-Wrecking Co. v. United States, (1901) 106 Fed. 385, 45 C. C. A. 343, 53 L. R. A. 122.

8—Pierce v. Fuller, (811) 8 Mass. 223, 5 Am. Dec. 102.

9—Tayloe v. Sandiford, (1822) 7 Wheat. (U. S.) 13, 5 L. ed. 384.

10—Van Buren v. Digges, (1850) 52 U. S. (11 How.) 461, 13 L. ed. 771. The word "fine" has been held to indicate a penalty. Laubenheimer v. Mann, (1865) 19 Wis. 519. An agreement "to forfeit and pay" has been held to liquidate damages. Cheddick's Executor v. Marsh, (1848) 21 N. J. Law 463.

11—Hall v. Crowley, (1862) 5 Allen (Mass.) 304, 81 Am. Dec. 745.

fect as to any other kind of breach than that kind for which the parties intend a liquidation of damages.

A valid agreement for liquidated damages in a certain sum per day for each day that a building remains uncompleted, does not, in the event of a total breach and abandonment by the contractor, authorize a permanent continuance of the accrual of the stipulated damages; for the other party must, within a reasonable time after the breach, take measures to avoid damage by procuring others to do the work. Furthermore, such an agreement is not available to bar the plaintiff from recovering the damages actually sustained by him, as it is, in such a case, the intention of the parties to have the liquidated damages paid only on the actual but tardy completion of the work, and not upon its abandonment, which is a contingency not contemplated by the parties to such a contract. Abandonment brought an end to the agreement.[12]

36. **Principles of Differentiation.**—Whether a sum named is liquidated damages or is a penalty, is to be determined, it is usually said, by the actual intention of the parties.[13] Whether the stipulation is for liquidated damages or for a penalty, may be gathered from the contract itself and from circumstances. The certainty or uncertainty of the amount of damage likely to result from a breach, and the reasonableness or unreasonableness of the amount named, are important. If the amount of damage to be suffered in case of breach is positively a certain sum, and the parties have named a sum materially larger, it is clear that, notwithstanding any language they have used indicating otherwise and even notwithstanding any intention they may have had to constitute the sum liquidated damages,[14] they have stipulated

12—Murphy v. United States Fidelity, etc., Co., (1905) 91 N. Y. Supp. 582, 100 App. Div. 93.

13—Chamberlain v. Bagley, (1840) 11 N. H. 234; Slosson v. Beadle, (1810) 7 Johns. 72.

14—Jaquith v. Hudson, (1858) 5 Mich. 123. "The real question

for a penalty.[15] A sum that is, under all circumstances, unconscionably large, will not be construed as liquidated damages. If the amount named as liquidated damages is such as may properly have been in the contemplation of the parties as only fair compensation in case of breach, the stipulation is construed as being for liquidated damages.[16] Where the parties have named a sum

in this class of cases will be found to be, not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must therefore, we think, be very obvious that the actual intention of the parties, in this class of cases, and relating to this point, is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and can not, be made the real basis of these decisions.''

Although the doctrine set forth in it is questionable, the following extract from a comparatively recent opinion of the United States Supreme Court is worthy of our notice: ''The courts at one time seemed to be quite strong in their views, and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts and to carry out their intentions, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained. * * * The question always is: What did the parties intend by the language used? When such intention is ascertained, it is ordinarily the duty of the court to carry it out.''—United States v. Bethlehem Steel Co., (1907) 205 U. S. 105, 51 L. ed. 731, 27 Sup. Ct. 450; quoted with approval, Banta v. Stamford Motor Co., (1914) 89 Conn. 51, 92 Atl. 665.

The statement in Jaquith v. Hudson seems more in accord with what courts have usually done in such cases than does the Banta case.

15—Kemble v. Farren, (1829) 6 Bing. 141, 130 Eng. Repr. 1234.

16—Keeble v. Keeble, (1888) 85 Ala. 552, 5 So. 149; Monmouth Park Association v. Wallis Iron Works, (1893) 55 N. J. Law 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; Curtis v. Van Bergh,

so large as to be out of all proportion to any possible damage that might result from a breach, they have stipulated for a mere penalty, even though the exact amount of possible damage is uncertain.[17] So it is where A agrees to pay B $10 on a certain date, and to pay him $50 in case of default in payment, or where A agrees to supply B with $5 worth of sugar, and to pay B $100 in case of breach, it appearing that B could not be injured by the breach to an extent even approximating $100. Where two parties contract in regard to a number of details, some of much importance and some of little, and agree that, upon a breach of the contract as to any detail, a certain sum shall be paid, the stipulation is for a penalty.[18] To hold otherwise might make it possible to collect a thousand dollars for damage that could not possibly exceed one dollar. Likewise, where an agreement contains various stipulations, damages for the breach of some stipulations being capable of measurement by a precise sum far below the amount stated, a

(1899) 161 N. Y. 47, 55 N. E. 398; Illinois Central R. Co. v. Southern Seating & Cabinet Co., (1900) 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729.

17—Clement v. Schuylkill River R. Co., (1890) 132 Pa. 445, 19 Atl. 274, 276.

18—Kemble v. Farren, (1829) 6 Bing. 141, 130 Eng. Repr. 1234; Pye v. British Automobile Commercial Syndicate Limited, L. R. I. K. B. 1906, 425. Mayor of Brunswick v. Aetna Indenity Co., (1908) 4 Ga. App. 722, 62 S. E. 475; quoted with approval in George W. Muller Bank Fixture Co. v. Georgia Ry. & Electric Co., (1916) 145 Ga. 484, 89 S. E. 615. But see Barrett v. Monro, (1912) 69 Wash. 229, 124 Pac. 369, which permits a party to obtain $1200 for a breach that had actually cost $200, and intimates that the same conclusion would have been reached if the breach had occasioned a loss of only $20. This case can hardly be said to be in accord with the weight of authority. Of course, it could never be laid down as a rule of law that liquidated damages could not be given effect as such, merely because it is seen at the time of the trial that the actual loss is much smaller than the amount named; but the contract involved in this case obviously covered many matters of varying importance, and the sum named purported to be for compensation for a breach of any stipulation, with no apparent discrimination between matters great and matters small.

figure named to be paid in case of the non-performance of any part of the contract, is a penalty.[19]

Where the intention is not clear to have it so, a sum named will not be regarded as liquidated damages.[20] In doubtful cases, courts feel that they can come nearer to administering real justice by calling the stipulated amount a penalty, since, by so doing, they can leave the question of amount of damages open and thus make it possible to assess actual damages as in an ordinary case wherein no stipulation of any sum has been made.[21]

If the parties stipulate a certain amount as liquidated damages for an entire breach of the contract, and there follows a valid part performance, there can be a recovery of actual damages only, the amount stated as liquidated damages being of effect only in case of an entire breach.[22]

37. **Agreed Valuation.**—It sometimes happens that the parties to a contract agree that one of the parties shall return or deliver certain property to the other, and that if he does not, he will pay for it at an agreed valuation. The figure agreed upon is considered liquidated damages, and therefore it may be collected in full in case of default.[23]

38. **Deposits.**—A deposit made in order to insure performance of an agreement by the depositor, may be a penalty; it may be liquidated damages; or it may be neither. In order to determine whether the deposit is

19—Kemble v. Farren, (1829) 6 Bing. 141, 130 Eng. Repr. 1234.

20—Colwell v. Lawrence, (1868) 38 N. Y. 71, 36 How. Pr. 306, aff. 36 Barb. 643, 24 How. Pr. 324; Dennis v. Cummins, (1803) 3 Johns. Cas. (N. Y.) 297, 2 Am. Dec. 160.

21—"In general, it is the tendency and preference of the law, to regard a sum, stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages, because then it may be apportioned to the loss actually sustained."—Shaw, C. J., in Shute v. Taylor, (1842) 5 Metc. (Mass.) 61.

22—Shute v. Taylor, supra.

23—Sun Printing & Publishing Association v. Moore, (1902) 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. 240.

intended to be held as liquidated damages in case of a breach, the agreement and the circumstances must be considered, as in other cases.[24]

39. **Illegal Stipulation of Damages.**—Sometimes parties have, in order to avoid statutory prohibition of usury, contracted for "liquidated damages" in a sum in excess of the amount permitted by law to be charged as interest. Such a stipulation, whatever the terms employed by the parties, is not enforced as for liquidated damages. It would not be public policy to permit, under a different name, the usury which is prohibited by statute.[25]

40. **Interest on Liquidated Damages.**—Since a stipulation for liquidated damages, when given effect as such, is for a stated sum, which has become due at a definite time, the date of the occurrence of the breach, it follows that interest on the liquidated damages from the time of the breach should be allowed, in any state in which interest is made a part of verdicts for sums liquidated and overdue;[26] but this rule does not always prevail.[27]

41. **Alternative Agreements.** — Where one person merely agrees that he will do a certain act or that he will pay the other party to the agreement a certain sum of money, the contract is what is known as an alternative agreement, which is a matter neither of liquidated damages nor of penalty. The amount stipulated in such an agreement is merely a price fixed for what the contract permits him to do if he pays.[28]

24—Willson v. Mayor of Baltimore, (1896) 83 Md. 203, 34 Atl. 774, 55 Am. St. Rep. 339; Caesar v. Rubinson, (1903) 174 N. Y. 492, 67 N. E. 58.

25—Clark v. Kay, (1858) 26 Ga. 403; Chapman v. Comings, (1870) 43 Vt. 16.

26—Little v. Banks, (1881) 85 N. Y. 258; Winch v. Mutual Benefit Ice Co., (1881) 86 N. Y. 618.

For general principles, see Chapter XXVI, "Interest."

27—Hoagland v. Segur, (1876) 38 N. J. Law 230.

28—Smith v. Bergenren, (1891)

CASE ILLUSTRATIONS

1. "I do hereby promise Mrs. Catherine Lowe, that I will not marry with any person besides herself: if I do, I agree to pay to the said Catherine Lowe £1,000 within three months next after I shall marry anybody else." Held, a stipulation for liquidated damages.[29]

2. A sells a partnership interest to B, and contracts not to engage in the mercantile business in Trenton within three years, and agrees to forfeit $1,000 as damages for non-performance of the stipulation. Upon A's breaking the agreement, B can recover $1,000 damages, as the stipulation is in regard to damages of which the amount is uncertain and incapable of accurate proof in court.[30]

3. Defendant covenants that he will pay plaintiff £1,000 "as and for liquidated damages and not by way of a penalty," if defendant shall violate his covenant not to practice surgery or reside within two and one-half miles of No. 28 Dorset-Crescent. Defendant takes up his residence a few feet within the prohibited distance. Plaintiff may recover the £1,000. Where a contract consists of stipulations, of which the breach cannot be measured, the sum named as liquidated damages is agreed upon as such, and not as a penalty. All the stipulations here were of uncertain value.[31]

4. Defendant, selling his bakery to plaintiff for $1,400, contracted not to enter the bakery business within a radius of five blocks from the bakery sold, and agreed to pay plaintiff $2,000 in case of his violation of the agreement. Plaintiff being no longer in the bakery business in the city, defendant opened a bakery in the area prohibited by the contract. The $2,000 cannot be assessed as liquidated damages. The amount was not described in the contract as being either liquidated damages or a penalty; and, in such a case, the tendency of courts is to call it

153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768; Pearson v. Williams' Administrators, (1840) 24 Wend. (N. Y.) 244.

29—Lowe v. Peers, (1768) 4 Burr. 2225, 98 Eng. Repr. 160. (Decided by Lord Mansfield.)

30—Jaquith v. Hudson, (1858) 5 Mich. 123.

31—Atkyns v. Kinnier, (1850) L. R. 4 Exch. 776.

a penalty. It also appears from the evidence that plaintiff suffered no damage from the breach.[32]

5. Defendant sold his laundry to plaintiff,, agreeing not to engage in the laundry business in the city, for five years, without permission of plaintiff, and promising to pay plaintiff one dollar per day for the time he might so engage in business in violation of the contract. Defendant violated the agreement. The one dollar per day is recoverable as liquidated damages.[33]

6. Defendant contracted to build a pleasure yacht for plaintiff and to have it ready for delivery by September 1, 1911. Defendant further agreed that he would pay the plaintiff $15 per day for any delay in delivery after the specified date. Held, liquidated damages. "The extent that the plaintiff might have been injured by delay in the completion of the yacht which he was desirous of using in the fall months for cruising in the Chesapeake and Florida waters, and the measure of it in money, both lie in a marked degree in the field of uncertainty."[34]

7. A contractor agreed to erect a building for a church, and to pay $10 per day for any delay in completing it after September 1, 1913. Held, liquidated damages.[35]

8. A agrees to build a pumping-station for a city, promising to pay $50 for each day of delay beyond the date agreed upon. Held, a contract for liquidated damages. "It is beyond question that there could be no estimate of damages or compensation for the inconvenience to the public or damage resulting from a failure to complete the contract as agreed, and if the parties did not intend that the stipulated sum should be liquidated damages they did not intend that any damages could be recovered, since none could be proved."[36]

32—Radloff v. Haase, (1902) 196 Ill. 365, 63 N. E. 729.

33—Augusta Steam Laundry Co. v. Debow, (1904) 98 Me. 496, 57 Atl. 845.

34—Banta v. Stamford Motor Co., (1914) 89 Conn. 51, 92 Atl. 665. So it was held to be liquidated damages, where C, contracting to build torpedo-boat destroyers for the Spanish government, agreed to pay a "penalty" of £500 per week for each vessel not delivered in contract time.—Clydebank Engineering Co. v. Don Jose Ramos Yzquierdo y Casteneda, L. R. 1905 App. Cas. 6.

35—Walsh v. Methodist Episcopal Church South, (Tex. Civ. App. 1915) 173 S. W. 241.

36—Parker-Washington Co. v. Chicago, (1915) 267 Ill. 136, 107 N. E. 872, Ann. Cas. 1916 C 337.

9. Defendant contracted to furnish plaintiff, for use in building a court house, $13,000 worth of terra cotta, to be manufactured especially for the purpose; and defendant further agreed to pay plaintiff $50 "liquidated damages" for each day's delay. For a delay of 29 days, the plaintiff cannot recover on the contract stipulation, since it is for a penalty and not for liquidated damages.[37]

10. The defendant contracted to act as a principal comedian at the plaintiff's theater, during four seasons, and to conform to the regulations of said theater; and the plaintiff agreed to pay the defendant £3 6s. 8d. per night. The agreement contained a clause, that if either party should not fulfill the agreement, or any part thereof, or any stipulation therein, such party should pay the other the sum of £1,000 liquidated damages. The defendant refused to act during the second season. The jury assessed plaintiff's damages at £750. Plaintiff contends that he should have been awarded the £1,000 as liquidated damages. His contention is not sound; the £1,000 is a penalty. The parties intended it to relate to even so ascertained and disproportionately small a matter as a single breach of plaintiff's duty to pay defendant his daily wage, or a mere violation of theater rules by defendant, for which such rules themselves set certain penalties. "That a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty, appears to be a contradiction of terms."[38]

11. A agreed to furnish B 1,000 pounds of milk each day for 5 years, for which defendants were to pay 12 cents per gallon. A further promised to pay as liquidated damages 5 cents per gallon not furnished. Held, liquidated damages.[39]

12. A employed B as manager of a store, B agreeing not to become intoxicated, and, in the event of his becoming so, to pay $1,000 as liquidated damages. Held, that, upon becoming intoxicated, B must pay A $1,000. The damage resulting from the

37—Northwestern Terra Cotta Tile Co. v. Caldwell, (1916) 234 Fed. 491. See note, 26 Yale L. J. 155.

38—Kemble v. Farren, (1829) 6 Bing. 141, 130 Eng. Repr. 1234.

39—Mondamin Meadows Dairy Co. v. Brudi, (1904) 163 Ind. 642, 72 N. E. 643.

breach could not be ascertained with any degree of certainty, and the amount agreed upon is not disproportionate to the damages which may have been actually sustained in this case.[40]

13. Plaintiffs and defendants conducted rival department stores. Plaintiffs sold defendants $46,000 worth of goods, but remained in business under the name "Famous," as before. Defendants bound themselves in the penal sum of $5,000 as liquidated damages, not to advertise any other goods as having been bought from plaintiffs. Defendants violated the agreement, using the terms, "Famous," and "Famous Stock," in connection with goods not purchased of plaintiffs. The sum of $5,000 may be recovered as liquidated damages.[41]

14. A & Co. leased to B an apartment house, at $600 per month, for 5 years, with a stipulation that B deposit with A & Co. $1,200, to be held by lessors as an indemnity fund to be applied as liquidated damages for any loss lessors might sustain by reason of any violation by lessee. B fell into arrears 10 days in payment of rent. A & Co. brought suit for possession of the premises. B then surrendered, and brought an action to recover the $1,200 deposit. Held, that B cannot recover the $1,200 or any part of it, as the amount is not merely security for rent, but is liquidated damages. A loss of the tenancy of B might cause damage to lessors difficult of ascertainment, whether resulting from B's surrender or from A & Co.'s election to terminate the lease after B's default.[42]

15. Defendant agreed to convey a certain right of way to plaintiff, and gave a bond for $1,000 and $100 attorney's fees, to insure performance. As a matter of fact, plaintiff already had the right of way by prescription. Defendant did not convey. Plaintiff sues on the bond. Held, a penalty. "We have, then, a case where a bond provides for the payment of $1,000 as 'liquidated damages' for a breach, and the evidence shows that the breach could cause but nominal damages."[43]

16. Plaintiff, an employee of defendant, agreed that, in the event of her quitting the employment, she would give two weeks'

40—Keeble v. Keeble, (1888) 85 Ala. 552, 5 So. 149.

41—May v. Crawford, (1898) 142 Mo. 390, 44 S. W. 260.

42—Barrett v. Monro, (1912) 69 Wash. 229, 124 Pac. 369. This case is unsound.

43—Dryer v. Kistler, (1912) 118 Minn. 112, 136 N. W. 750.

notice of her intention to do so, and that, if she should fail to do so, the sum of $10 was agreed upon as liquidated damages to be paid to defendant. Her earnings were 50 cents per day. Her work was in a necessary department of a highly organized cotton mill, so that some loss would be likely to be suffered by defendant if plaintiff should cease work without notice. It would be impossible to calculate with any certainty what such loss would be. Held, liquidated damages.[44]

17. Plaintiff and defendant entered into a contract, under which it was agreed that, in case of breach of any one of a number of stipulations, a certain sum should become due as liquidated damages. Some of the stipulations were in regard to matters so trivial that a breach of them could not have caused plaintiff as much damage as the stipulated amount. Held, that this was an agreement for a penalty, and not for liquidated damages.[45]

18. Defendant executed a bond "in the full and just sum of $500, liquidated damages," conditioned that he convey to plaintiff, on demand, a certain 3,000 feet of land upon certain consideration. The land was later conveyed, but was found to contain nearly 500 feet less than the amount agreed upon. Plaintiff accepted this part performance and sued for the $500 on the bond. Held, that, as part performance had been accepted, the $500 could not be assessed as liquidated damages; and only the damages actually suffered could be assessed.[46]

19. The Sun rented plaintiff's yacht for use as a dispatch boat in the Spanish-American war, agreeing to return it in good condition. The value of the yacht was agreed to be $75,000. The yacht was wrecked. The full agreed value may be recovered as liquidated damages.[47]

20. "The defendant covenanted never to practice his pro-

44—Tennessee Mfg. Co. v. James, (1892) 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865. But an agreement to forfeit all wages due at the time of the breach of a contract of employment, is for a penalty. Shrimpf v. Tennessee Mfg. Co., (1887) 86 Tenn. 219, 6 S. W. 131; Richardson v. Woehler, (1872) 26 Mich. 90.

45—Geo. W. Muller Bank Fixture Co. v. Georgia Ry. & Electric Co., (1916) 145 Ga. 484, 89 S. E. 615.

46—Shute v. Taylor, (1842) 46 Mass. (5 Metc.) 61.

47—Sun Printing & Publishing Association v. Moore, (1902) 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. 240.

fession in Gloucester so long as the plaintiff should be in practice there, provided, however, that he should have the right to do so at any time after five years by paying the plaintiff $2,000, 'but not otherwise.' This sum of $2,000 was not liquidated damages; still less was it a penalty. It was not a sum to be paid in case the defendant broke his contract and did what he had agreed not to do. It was a price fixed for what the contract permitted him to do if he paid.'' This was an alternative contract.[48]

21. A, a physician who had been suffering from a sore on his face, contracted with B, a specialist in certain diseases, that he would, in the event that B cured him, either give B a certificate of his skill and proficiency as a specialist in the treatment of the trouble from which A had suffered, or pay him $5,000 in cash. Held, that this is not an agreement for a penalty, but that it is a mere alternative agreement.[49]

48—Smith v. Bergenren, (1891) 153 Mass. 236, 26 N. E. 690, 10 L. R. A. 768.

49—Burgoon v. Johnston, (1899) 194 Pa. St. 61, 45 Atl. 65.

CHAPTER X

Nominal Damages

42. **In General.**—Nominal damages may be given for an invasion of a legal right, whether by breach of contract [1] or by tort,[2] where resulting damage is trivial,[3] inappreciable,[4] or wholly absent.[5] Even where defendant's wrong results in a net benefit to plaintiff, there is a right to nominal damages.[6] In any case in which there is a mere technical right of action, no more than nominal damages may be awarded.[7] Some very important actions are brought purely for the purpose of establishing a right or of preventing a trespasser from continuing a trespass, harmless in itself, but a possible basis of an easement dominating plaintiff's property. In such cases, nominal damages are assessed.[8]

Such damages are also awarded where there has been

1—Tufts v. Bennett, (1895) 163 Mass. 398, 40 N. E. 172.

2—Foster v. Elliott, (1871) 33 Ia. 216; Hooten v. Barnard, (1884) 137 Mass. 36.

3—Southern Ry. Co. v. Cartledge, (Ga. App. 1912) 73 S. E. 703; White v. Stanbro, (1874) 73 Ill. 575; Bartolini v. Grays Harbor, etc., Co., (1915) 88 Wash. 341, 153 Pac. 4.

4—Cory v. Silcox, (1854) 6 Ind. 39.

5—Slingerland v. International Contracting Co., (1901) 169 N. Y. 60, 61 N. E. 995, 56 L. R. A. 494. See also opinion of Holt, C. J., in Ashby v. White, (1703) 2 Ld. Raym. 938, 92 Eng. Repr. 126.

6—Jewett v. Whitney, (1857) 43 Me. 242; Murphy v. Fondulac, (1868) 23 Wis. 365.

7—Haven v. Beidler Mfg. Co., (1879) 40 Mich. 286. Second Congregational Society v. Howard, (1834) 33 Mass. (16 Pick.) 206, holds that where a grantor wrongfully takes a deed from grantee's possession, he is liable in trespass for nominal damages only, as the trespass did not deprive the grantee of title to the land. See also Frothingham v. Everton, (1841) 12 N. H. 239.

8—Peck v. Clark, (1886) 142 Mass. 436, 8 N. E. 335.

an invasion of a legal right, resulting in damage of which the amount is either incapable of proof or has not been proved on the trial. Where damages sought to be recovered are only speculative and uncertain, no more than nominal damages can be awarded.[9] The rules of certainty, elsewhere stated,[10] preclude the recovery of compensatory damages in such cases. Mere inability of plaintiff to prove the exact amount of his damage, will not, however, limit his recovery to nominal damages.[11]

It sometimes happens, where the damages claimed are for a pecuniary loss, that, through an oversight of plaintiff's attorney, or otherwise, there is a total failure of the plaintiff to prove damage or the amount thereof, even where he has abundantly proved an invasion of his legal rights. In such a case, obviously, the court cannot permit the jury to speculate upon the fact of damage or the extent of it and to render a verdict for substantial damages, the amount being the result of wild guesswork; so the court must instruct the jury to find a verdict for nominal damages only; and, in the event of a finding of substantial damages, the verdict must be set aside. "Where the loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only." [12]

43. **Importance of the Question Whether Damage Is the Gist of the Action.**—In determining whether nominal damages may be awarded in the total absence of damage,

9—Chamberlain v. Parker, (1871) 45 N. Y. 569.

10—See Chapter VI.

11—Jenkins v. Pennsylvania R. Co., (1902) 67 N. J. Law 331, 51 Atl. 704, 57 L. R. A. 309.

12—Leeds v. Metropolitan Gaslight Co., (1882) 90 N. Y. 26.

See also: State ex rel. Lowery v. Davis, (1889) 117 Ind. 307, 20 N. E. 159; Stevens v. Yale, (1897) 113 Mich. 680, 72 N. W. 5; Peek v. Northern Pacific Ry. Co., (1915) 51 Mont. 295, 152 Pac. 421; Chamberlain v. Parker, (1871) 45 N. Y. 569; Kies v. Binghamton R. Co., (1917) 163 N. Y. Supp. 736.

one must always ascertain within what class the case falls. If the wrong done is such as to be actionable only if damage is done,—or, to state it another way, if damage is the gist of the action,—of course not even nominal damages can be awarded unless some actual damage is shown. Therefore, there is, properly speaking, no such thing as nominal damages in these cases. If damage in such a case is trivial, it is properly the basis of small compensatory damages, although the difference between the amount of such damages and nominal damages is, in some cases, either nothing or so small as to cause courts occasionally to treat them as nominal damages. On the other hand, there are many wrongs that are actionable *per se;* that is, they are actionable even if no damage is done. Such are assault, battery, slander and libel (if the words used are actionable *per se*), seduction, false imprisonment, trespass to personalty or realty, and breach of contract. In such cases, even if no actual damage is proved, nominal damages may be recovered.

44. **Nominal Damages and Small Damages.**[13]—Very small damages for an injury that is trivial but actual, are often treated as a kind of nominal damages;[14] but a distinction between small damages and nominal damages is logical and proper. Such a distinction is stated in a Connecticut case, the court saying: "Small damages, however, and nominal damages, do not mean the same thing. Where there is a real right involved, the damages, even if very small, are substantial and not nominal."[15]

13—See article by the writer, "Are Small Compensatory Damages Merely Nominal?" 51 Am. Law Rev. 37, and cases there cited.

14—White v. Stanbro, (1874) 73 Ill. 575; Cady v. Fairchild, (1820) 18 Johns. (N. Y.) 129, 6 N. Y. Com. Law 532.

15—Chapin v. Babcock, (1896) 67 Conn. 255, 34 Atl. 1039. See 4 Sedg. on Dam. (9th ed.) 165, citing Tri-State T. & T. Co. v. Cosgrif, (1909) 19 N. Dak. 771, 124 N. W.

45. **Where Plaintiff's Case Is so Small as Not to Justify even Nominal Damages.**—Some cases have arisen in which the encroachment upon the plaintiff's right has been so trivial and the resulting damage so very small, that the court has ruled that not even nominal damages are recoverable, following the well known maxim, "*de minimis non curat lex.*" [16]

46. **Plaintiff's Right to a New Trial.**—A court will not remand a case for a new trial, where the sole error is the failure to award nominal damages, if a judgment for them would not have carried costs.[17] "Unless some substantial right beyond damages is involved, the court will not reverse a judgment against the plaintiff merely for the purpose of enabling him to obtain nominal damages, when it is quite clear from the case presented that he would be entitled to no more." [18] Where the recovery

75, 26 L. R. A. (N. S.) 1171. See also Wartman v. Swindell, (1892) 54 N. J. Law 589, 25 Atl. 356, 18 L. R. A. 44; where the court says: "I am not prepared to say that a verdict for substantial damages would not have been justifiable," although the evidence seemed to indicate very small damage.

Small amount paid for a sleeping-car ticket, of which amount passenger was entitled to a return upon his justifiable exclusion from the car, was held to be substantial damages, as contradistinguished from nominal damages.—Pullman Car Co. v. Krauss, (1906) 145 Ala. 395, 40 So. 398, 4 L. R. A. (N. S.) 103, 8 Ann. Cas. 218.

16—Paul v. Slason, (1850) 22 Vt. 231, 54 Am. Dec. 75. The doctrine in Paul v. Slason seems questionable, there being much room for argument that, there being a trespass, and damage not being the gist of trespass, at least nominal damages must be assessed. The law is well stated in Wartman v. Swindell, supra.

17—Blackburn v. Alabama, etc., R. Co., (1904) 143 Ala. 346, 39 So. 345, 5 Ann. Cas. 223; Haven v. Beidler Mfg. Co., (1879) 40 Mich. 286.

See note on "Failure to Give Nominal Damages as Reversible Error," 5 Ann. Cas. 225.

18—Rambaut v. Irving National Bank, (1899) 42 N. Y. App. Div. 143, 58 N. Y. Supp. 1056, citing Stephens v. Wider, (1865) 32 N. Y. 351. See also Cady v. Fairchild, (1820) 18 Johns. (N. Y.) 129, 6 N. Y. Com. Law 532.

An interesting corollary to the general rule is presented in Kramer v. Perkins, (1907) 102 Minn. 455, 113 N. W. 1062, 15 L. R. A. (N. S.) 1141.

of nominal damages would enable the plaintiff to get costs, there is a conflict of authority as to whether a reversal should be granted plaintiff in order that he may have costs.[19] In "hard actions," a new trial will not be granted for a mere failure to award nominal damages, even where the assessment of nominal damages would have carried costs.[20] If the failure of the jury to assess nominal damages has deprived plaintiff of a substantial or permanent right, he has a right to a reversal.[21]

CASE ILLUSTRATIONS

1. The plaintiff held a pew in a meeting-house, which was in such a ruinous condition that it could not be used as a house of worship. The defendant tore up and destroyed the pew, together with other pews. The plaintiff can get nominal damages only, as he had only a right to occupy his pew during public worship, and the facts showed that there was no such worship in the meeting-house.[22]

2. A collecting agent failed to return to his principal a note of which the maker was insolvent. The agent is liable to the principal in nominal damages only.[23]

3. A party was deprived of the use of gas. It appeared that

19—East Moline Co. v. Weir Plow Co., (1899) 95 Fed. 250, 37 C. C. A. 62; Hickey v. Baird, (1860) 9 Mich. 32; Stevens v. Yale, (1897) 113 Mich. 680, 72 N. W. 5; hold that where nominal damages should have been awarded and would have carried costs, judgment for defendant is reversible error.

20—For a discussion of this point, see Jones v. King, (1873) 33 Wis. 422.

"Hard actions strictly include only civil proceedings, involving in their nature some peculiar hardship, arising from the odium attached to the alleged offense, or the severity of the punishment which the law inflicts on the offender in the shape of damages. To this belong most actions arising ex delicto. Trespass, slander, libel, seduction, malicious prosecution, criminal conversation, deceit, gross negligence, actions upon the statute, or qui tam actions, prosecuted by informers, and penal actions, prosecuted by special bodies, or the public at large, are ranged under this head."—1 Graham & Waterman on New Trials, 503 (ch. 14), quoted in Jones v. King, supra.

21—Merrill v. Dibble, (1882) 12 Ill. App. 85.

22—Howe v. Stevens, (1875) 47 Vt. 262.

23—Brumble v. Brown, (1875) 73 N. Car. 476.

the aggrieved party used lamps and lanterns as a substitute, which were cheaper than gas. The gas company, who had prevented the use of the gas, was not liable for more than nominal damages, in the absence of proof of damage.[24]

4. The defendant's clerk fraudulently sold very cheap and inferior cigars in boxes bearing the plaintiff's trademark, in order to injure the plaintiff and the reputation of the plaintiff's cigars. No evidence was given as to the amount of damage, and accurate proof on the point was impossible. The plaintiff can recover at least nominal damages, as he has suffered an infraction of a legal right.[25]

5. In an action for damage caused by the defendants to plaintiff's concrete mixing machine, proof was made of the market value of the machine at the time it was taken by defendants, but such value included parts not taken. No evidence was given as to the value of such parts. Evidence was also given as to the market value of the machine at the time of its return. But no proof was made of its market value at the time of the taking, without the parts not taken, and no facts were given in evidence from which such value could be computed. Held, that only nominal damages could be awarded.[26]

6. The plaintiff sued to recover damages for breach of a contract under which the defendants agreed to employ her for three years as an actress, and to pay her one half of the general profits of the business, in addition to certain expenses. The plaintiff, even in the absence of proof of *quantum* of damages, or even if performance would have been a positive injury to her, has a right to nominal damages, but a judgment for the defendant on the merits will not be disturbed in order to have such damages assessed.[27]

24—Detroit Gas Co. v. Moreton Truck & Storage Co., (1897) 111 Mich. 401, 69 N. W. 659.

25—Lampert v. Judge & Dolph Drug Co., (1911) 238 Mo. 409, 141 S. W. 1095, 37 L. R. A. (N. S.) 533, Ann. Cas. 1913 A 351.

26—Northwestern Equipment Co. v. Sofe, (1916) 91 Wash. 118, 157 Pac. 459.

27—Ellsler v. Brooks, (1886) 54 N. Y. Super. Ct. (22 Jones & S.) 73.

CHAPTER XI

Exemplary Damages

47. **In General.**—Exemplary, punitive, punitory, or vindictive damages are damages over and above compensation, assessed for the purpose of punishing the defendant wrongdoer, where he is guilty of actual malice, deliberate violence, oppression, wantonness, recklessness, or fraud.[1] Such damages, now allowed in most jurisdictions, are assessed only in cases of tort and breach of promise to marry.[2] It seems that the doctrine that a

1—All these elements are regarded as being or implying malice in law. See section on "Malice," post, p. 122. "In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly, or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." Lake Shore & M. S. Ry. Co. v. Prentice, (1893) 147 U. S. 101, 13 Sup. Ct. 261, 37 L. ed. 97.

2—For the allowance of exemplary damages for breach of promise to marry, see Chellis v. Chapman, (1891) 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784. Tortious elements involved in such a case cause the assessment of exemplary damages. For breach of duty of a carrier, accompanied by insult, indignity, or gross negligence, such damages are allowed in many instances; but most of such cases can be sustained on the ground that a tortious wrong has been inflicted, in addition to, or independently of, the breach of contract. Besides, the breach of a common carrier's contract may at the same time be a breach of a common law duty and therefore a tort. Alabama, etc., R. Co. v. Sellers, (1890) 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17; Pittsburgh, etc., R. Co. v. Lyon, (1889) 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. Rep. 517; Milhouse v. Southern Ry., (1905) 72 S. Car. 442, 52 S. E. 41, 110 Am. St. Rep. 620. One court has, however, allowed exemplary damages expressly on the ground of a breach of the carrier's contract. Knoxville Traction Co. v. Lane, (1899) 103 Tenn. 376, 53 S. W. 557, 46 L. R. A. 549.

jury may lawfully award exemplary damages grew out of the extreme reluctance of early courts to interfere with the verdicts of juries in tort cases, when urged to set aside such verdicts on the ground that the damages awarded were excessive.[3] The express rule that damages may be awarded for punishment and example is a distinct anomaly. The early common law theory, however far this may have been from fact in the practice of juries, probably was that damages were entirely compensatory. That damages are for compensation only, is the frequently quoted theory of Mr. Greenleaf.[4] Sedgwick, however, favors the doctrine of exemplary damages;[5] and Sutherland seems to uphold the doctrine on the ground that a malicious tort may cause more damage than a tort without malice, which makes exemplary damages, in theory, merely compensatory.[6] The strongest objection to the doctrine of exemplary damages, independent of statute, is that it has no positive basis in the early common law; but, however sound this objection is, so many cases within the past century and a half have recognized the rule, that, in most states, dissent from it is of only academic interest.

It has often been argued that the assessment of exemplary damages is objectionable, as the defendant may thus be punished without the benefit of the rules of the substantive criminal law and of evidence and procedure applicable to a criminal trial, guaranteed to a criminal defendant by statutory and constitutional provisions. In support of this contention, it is said that, by the assessment of damages for punishment, a defendant may be practically fined without any limit such as is usually provided by criminal statutes; and that he may thus be punished without either indictment or information, without the opportunity to meet witnesses against him face

3—See Chapter VIII, "Excessive and Inadequate Damages," and cases there cited.

4—Greenleaf, Ev. § 253.

5—1 Sedg. Dam. (7th ed.), p. 53.

6—Suth. Dam. § 390.

to face, and without proof of his guilt beyond a reasonable doubt; and all this notwithstanding the fact that he is liable criminally or has actually been punished criminally for the same offense. However valid on ethical grounds these objections may be, according to the weight of legal authority, they are disposed of by the principle that an act which is both a tort and a crime is, in theory, two offenses, one cognizable in a civil and the other in a criminal proceeding. Yet some courts, while recognizing the general doctrine of exemplary damages, refuse to assess such damages against a defendant who has been or may be punished criminally for the same act.[7]

It has also been urged that it is unjust that, in order to punish a defendant, his money should be taken from him and given to the plaintiff;[8] but most courts and public opinion, as expressed in statutes in some states, have taken the view that the assessment of exemplary damages, in appropriate cases, is eminently just.

In most jurisdictions, none of these objections has prevented the operation of the general rule. Whether the principle of exemplary damages is sound or not, it is usually followed. In cases in which damages are very uncertain, for instance, those in which the physical or mental suffering of the plaintiff is an element, it is doubtful whether the practical power of the jury or the size of verdicts is increased by the adoption of the rule of exemplary damages; for, in such cases, a jury may give a very large verdict, with little probability that the court will set it aside as excessive.[9]

7—See cases cited in note 14, this chapter.

8—For a presentation of various objections to the doctrine, see the famous case, Spokane Truck & Dray Co. v. Hoefer, (1891) 2 Wash. 45, 25 Pac. 1072, 11 L. R. A. 689, 26 Am. St. Rep. 842. See also Boyer v. Barr, (1878) 8 Neb. 68, 30 Am. Rep. 814.

9—See Chapter VIII, "Excessive and Inadequate Damages." But verdicts for even exemplary damages may be reduced or set aside as excessive; see article by writer, "Excessive Exemplary

The general doctrine that damages exceeding compensation may be awarded for the purpose of punishment and example, in cases of malicious torts, has the support of the decided weight of authority.[10] A few supreme courts have denied the doctrine as a rule of the common law;[11] some have so defined exemplary damages as to make them purely compensatory and therefore not exemplary at all; and some have placed important restrictions upon the operation of the general rule.[12] The principle, having no positive support in the early common law and no clear demarcation in the earliest cases affirming it, is far from constituting a uniform rule in the various jurisdictions, having divers limitations placed upon it by different courts.[13] Some of these limitations will be noticed in the paragraphs following.

Damages—The Relation of Exemplary to Compensatory Damages," 52 American Law Review 11.

10—Huckle v. Money, (1763) 2 Wils. 205, 95 Eng. Repr. 768; Merest v. Harvey, (1814) 5 Taunt. 442, 128 Eng. Repr. 761; Sears v. Lyons, (1818) 2 Starkie 317, 8 E. R. C. 363; Day v. Woodworth, (1851) 13 How. (U. S.) 363, 14 L. ed. 181; Lake Shore & M. S. Ry. Co. v. Prentice, (1893) 147 U. S. 101, 13 Sup. Ct. 261, 37 L. ed. 97; Goddard v. Grand Trunk Railway, (1869) 57 Me. 202, 2 Am. Rep. 39; Wort v. Jenkins, (1817) 14 Johns. (N. Y.) 352; Genay v. Norris, (1784) 1 Bay (S. Car.) 6.

Some states have exemplary damages by statute; e. g. Colorado and Georgia.

11—Greeley, etc., R. Co. v. Yeager, (1888) 11 Col. 345, 18 Pac. 211; Howlett v. Tuttle, (1890) 15 Col. 454, 24 Pac. 921; Bee Publishing Co. v. World Publishing Co., (1900) 59 Neb. 713, 82 N. W. 28; Spokane & Dray Co. v. Hoefer, (1891) 2 Wash. 45, 25 Pac. 1072, 11 L. R. A. 689, 26 Am. St. Rep. 842; Corcoran v. Postal Telegraph, etc., Co., (1914) 80 Wash. 570, 142 Pac. 29.

12—Smith v. Holcomb, (1868) 99 Mass. 552; Ellis v. Brockton Co., (1908) 198 Mass. 538, 84 N. E. 1018; Detroit Daily Post Co. v. McArthur, (1868) 16 Mich. 447; Welch v. Ware, (1875) 32 Mich. 84; Beck v. Thompson, (1888) 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870; holding that exemplary damages can be assessed only as compensation for the aggravation of the injury caused by the defendant's malice. See also Maisenbacker v. Society Concordia, (1899) 71 Conn. 369, 42 Atl. 67, 71 Am. St. Rep. 213; holding that exemplary damages cannot exceed the plaintiff's expenses of litigation, less his taxable costs.

13—See article by the writer, 82 Central Law Journal 262.

48. **For Acts Punishable Criminally.**—Some courts hold that exemplary damages cannot be awarded in a tort case based upon facts which make the defendant punishable criminally.[14] In Pennsylvania, it is held that, if defendant has been convicted of a criminal offense growing out of the same acts, the record showing conviction and sentence may be offered in evidence and considered by the jury in mitigation of exemplary damages.[15] The weight of authority is that criminal liability for the same act does not prevent the assessment of exemplary damages,[16] and that the fact of the infliction of punishment in a criminal proceeding is not admissible in evidence to mitigate damages.[17]

49. **Predicated Upon Actual Damage?**—Exemplary damages are not generally held recoverable unless there is proof of actual damage.[18] What constitutes actual

14—Taber v. Hutson, (1854) 5 Ind. 322, 61 Am. Dec. 96; Wabash Printing & Publishing Co. v. Crumrine, (1889) 123 Ind. 89, 21 N. E. 904; Anderson v. Evansville Brewing Ass'n, (Ind. App. 1912) 97 N. E. 445; Indianapolis Bleaching Co. v. McMillan, (Ind. 1916) 113 N. E. 1019, 83 Cent. Law J. 427; Patterson v. New Orleans, etc., Co., (1903) 110 La. 797, 34 So. 782; Austin v. Wilson, (1849) 4 Cush. (Mass.) 273, 50 Am. Dec. 766; Fay v. Parker, (1873) 53 N. H. 342, 16 Am. Rep. 270.

15—Wirsing v. Smith, (1908) 222 Pa. 8, 70 Atl. 906.

16—Brown v. Evans, (1883) 17 Fed. 912; aff. 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. 83; Smith v. Bagwell, (1882) 19 Fla. 117, 45 Am. Rep. 12; Brannon v. Silvernail, (1876) 81 Ill. 434; Hauser v. Griffith, (1897) 102 Ia. 215, 71 N. W. 223; Barr v. Moore, (1878) 87 Pa. 385, 30 Am. Rep. 367.

17—Hoadley v. Watson, (1873) 45 Vt. 289, 12 Am. Rep. 197; Klopfer v. Bromme, (1870) 26 Wis. 372.

18—Freese v. Tripp, (1873) 70 Ill. 496 (under a statute imposing civil liability upon liquor dealers for selling intoxicants to drunkards); Kuhn v. Chicago, etc., Ry. Co., (1888) 74 Ia. 137, 37 N. W. 116; Schippel v. Norton, (1888) 38 Kan. 567, 16 Pac. 804; Sondegard v. Martin, (1910) 83 Kan. 275, 111 Pac. 442; Bethea v. Western Union Telegraph Co., (1914) 97 S. Car. 385, 81 S. E. 675. Contra: Press Publishing Co. v. Monroe, (1896) 73 Fed. 196, 19 C. C. A. 429, 38 U. S. App. 410, 51 L. R. A. 353; Alabama Great Southern R. Co. v. Sellers, (1890) 93 Ala. 9, 9 So. 375, 30 Am. St. Rep. 17. Where a ver-

damage sufficient to form a basis for the assessment of exemplary damages, is a question on which the courts are divided; some holding that "nominal actual" damage is sufficient,[19] and others holding *contra*.[20] There is some confusion in the use of the term "nominal damages" in the cases involving this point, some courts seeming to regard nominal damages as based upon some slight damage, and other courts considering nominal damages a clear indication that the plaintiff has proved only the invasion of a legal right, with no actual damage.[21]

Mental anguish, anxiety, and distress of mind have been held not to furnish a sufficient basis for an allowance of exemplary damages, where no physical damage is shown.[22] It has sometimes been held that exemplary damages are not recoverable where the actual damage is capable of accurate pecuniary estimation.[23]

50. **Malice.**—Malice, in cases wherein the assessment of exemplary damages is appropriate, is of two kinds:

dict was for plaintiff, the jury finding such facts as would have entitled the plaintiff to actual damages, but assessing exemplary damages only, the error of failure to assess actual damages was favorable to defendant and therefore, from defendant's standpoint, harmless error, though, from the plaintiff's standpoint, the error was reversible. Adams v. St. Louis, etc., R. Co., (Mo. App. 1910) 130 S. W. 48. In Louisville, etc., R. Co. v. Ritchel, (1912) 148 Ky. 701, 147 S. W. 411, Ann. Cas. 1913 E 517, 41 L. R. A. (N. S.) 958, actual damage was proved, but a verdict was rendered for exemplary damages only; yet the verdict was held good as against the defendant.

19—Wilson v. Vaughn (1885) 23 Fed. 229; Lampert v. Judge & Dolph Drug Co., (1911) 238 Mo. 409, 141 S. W. 1095, Ann. Cas. 1913 A 351, 37 L. R. A. (N. S.) 533; Saunders v. Gilbert, (1911) 156 N. Car. 463, 72 S. E. 610, 38 L. R. A. (N. S.) 404.

20—Stacy v. Portland Publishing Co., (1878) 68 Me. 279.

21—See article by author, "Are Small Compensatory Damages Merely Nominal," 51 Am. Law Rev. 37.

22—West v. Western Union Telegraph Co., (1888) 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; Ramey v. Western Union Telegraph Co., (1915) 94 Kan. 196, 146 Pac. 421.

23—Durfee v. Newkirk, (1890) 83 Mich. 522, 47 N. W. 351; which was in trespass on the case, but really grew out of a contract of sale. See also Michaelis v. Michaelis, (1890) 43 Minn. 123, 44 N.

actual malice, which is malice in fact, or malice in the ordinary sense; and implied malice, which is malice in law, or that which the law regards as being or implying malice.[24] "Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is in legal contemplation malicious. That which is done contrary to one's own conviction of duty, or with a wilful disregard of the rights of others, whether it be to compass some lawful end by unlawful means, or, in the language of the charge, to do a wrong and unlawful act knowing it to be such, constitutes legal malice."[25] It has often been held that gross negligence is a ground for the assessment of exemplary damages; but it would probably be more accurate to say that it is considered as evidence of such recklessness and wantonness as will amount to legal malice, or, as is sometimes stated, "the element of willfulness or conscious indifference to consequences, from which malice may be inferred."[26] "In order to warrant the recovery of puni-

W. 1149. Contra: Summers v. Keller, (1911) 152 Mo. App. 626, 133 S. W. 1180.

24—See discussion, Sutherland on Damages, § 394.

25—Shaw, C. J., in Willis v. Noyes, (1832) 12 Pick. (Mass.) 324; approved in Lynd v. Picket, (1862) 7 Minn. 184, Gil. 128, 82 Am. Dec. 79; and Anderson v. International Harvester Co., (1908) 104 Minn. 49, 116 N. W. 101, 16 L. R. A. (N. S.) 440; with which see L. R. A. note. See discussions of malice as a ground of exemplary damages, in Davis v. Hearst, (1911) 160 Cal. 143, 116 Pac. 530; and McNamara v. St. Louis Transit Co., (1904) 182 Mo. 676, 81 S. W. 880, 66 L. R. A. 486.

26—St. Louis, etc., Ry. Co. v. Hall, (1890) 53 Ark. 7, 13 S. W. 138. A case following this one states the law thus: "Negligence, however gross, will not justify a verdict for exemplary damages, unless the negligent party is guilty of willfulness, wantonness or conscious indifference to consequences from which malice will be inferred." Arkansas, etc., Ry. Co. v. Stroude, (1905) 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130. If this means that there must always be proof of willfulness, etc., in addition to proof of gross negligence, the proposition seems to be a doubtful one, as negligence may be so gross as to raise a presumption of legal malice. For an instance of the assessment of exemplary damages for "wilful negligence," see Emblen v. Myers, (1860) 6 Hurl. & N. 54, 158 Eng. Repr. 23.

tive or exemplary damages because of the negligence of the defendant, such negligence must be so gross as to amount to wantonness, where no willful or malicious acts are proven."[27] In a jurisdiction holding the inducing of a breach of another's contract to be a tort, it has been held that the intention of the defendant to procure a contract with plaintiff for himself, instead of plaintiff's existing contract, of which defendant caused the breach is not such malice as to sustain an award of exemplary damages.[28]

Where there is neither actual nor legal malice on the part of the person against whom the damages are to be assessed, exemplary damages cannot be awarded. So, where a wrongful act has been committed by mistake or under a *bona fide* claim of right,[29] without malice, there is no ground for exemplary damages. Likewise, only compensatory damages can be assessed against a young child[30] or an insane person,[31] since, in such a case, the defendant is incapable of entertaining such malice as to make the assessment of greater damages proper. If the defendant dies before trial, where the action survives against his representatives, the recovery is limited to compensation;[32] which is on the ground that exemplary damages, being for punishment, cannot properly be taken

27—Atchison, etc., Ry. Co. v. Ringle, (1905) 71 Kan. 839, 80 Pac. 43. See also New Orleans, etc., R. Co. v. Statham, (1869) 42 Miss. 607, 97 Am. Dec. 478.

28—Knickerbocker Ice Co. v. Gardiner Dairy Co., (1908) 107 Md. 556, 69 Atl. 405, 16 L. R. A. (N. S.) 746.

29—Ferguson v. Missouri Pac. Ry. Co., (Mo. 1915) 177 S. W. 616; Seely v. Alden, (1869) 61 Pa. 302, 100 Am. Dec. 642; Gwynn v. Citizens Telephone Co., (1904) 69 S. Car. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819; Franklin Plant Farm v. Nash, (1915) 118 Va. 98, 86 S. E. 836; Jopling v. Bluefield Waterworks Co., (1912) 70 W. Va. 670, 74 S. E. 943, 39 L. R. A. (N. S.) 814.

30—O'Brien v. Loomis, (1890) 43 Mo. App. 29.

31—McIntire v. Sholty, (1887) 121 Ill. 660, 13 N. E. 239, 2 Am. St. Rep. 140; Schriver v. Frawley, (1914) 167 Ia. 419, 149 N. W. 510; Krom v. Schoonmaker, (1848) 3 Barb. (N. Y.) 647.

32—Morris v. Duncan, (1906) 126 Ga. 467, 54 S. E. 1045.

from heirs or legatees, who cannot be guilty of malice in the perpetration of the tort, having taken no part in it. The assessment of exemplary damages in such a case, although not nominally against heirs or legatees, would, in fact, diminish their property interests in the estate of the deceased and so would be unjust.

51. **Tort by Defendant's Agent.**—There are two different and conflicting principles applied by different courts in the assessment of exemplary damages against a master or principal, some courts making the liability of the master or principal to exemplary damages dependent upon authorization or ratification of the wrongful act of the servant or agent, and others making it dependent upon the conduct of the servant or agent within the scope of his general authority.

Most courts hold that the malice of the agent is not imputable to the principal and that therefore a principal is not liable in exemplary damages unless he expressly authorized or ratified his agent's wrongful act, or was guilty of gross negligence in selecting his agent;[33] although some hold squarely *contra*.[34] "Since the *animus malus* must be shown to exist in every case before an award in punitive damages may be made against a defendant, since the evil motive is the controlling and essen-

33—Davis v. Hearst, (1911) 160 Cal. 143, 116 Pac. 530; Lightner Mining Co. v. Lane, (1912) 161 Cal. 689, 120 Pac. 771; Colvin v. Peck, (1892) 62 Conn. 155, 25 Atl. 355; Forhman v. Consolidated Traction Co., (1899) 63 N. J. Law 391, 43 Atl. 892; Hagan v. Providence, etc., R. Co., (1854) 3 R. I. 88, 62 Am. Dec. 377; Western Union Telegraph Co. v. Brown, (1882) 58 Tex. 170, 44 Am. Rep. 610; Ricketts v. Chesapeake, etc., R. Co., (1890) 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354; Robinson v. Superior, etc., Co., (1896) 94 Wis. 345, 68 N. W. 961, 34 L. R. A. 205, 59 Am. St. Rep. 897.

Sheriff held not liable in exemplary damages for unauthorized and unratified act of his deputy. Foley v. Martin, (1904) 142 Cal. 256, 75 Pac. 842, 100 Am. St. Rep. 123. But see Hazard v. Israel, (1808) 1 Binney (Pa.) 240, 2 Am. Dec. 438.

34—Fell v. Northern Pac. R. Co., (1890) 44 Fed. 248.

tial factor which justifies such an award, it follows of necessity that no principal can be held in punitive damages for the act of his agent, unless the particular act comes within the principal's specific directions or general suggestions, or unless the principal has subsequently ratified it; such ratification presupposing, it is said, original authorization."[35]

Where a malicious tort of an agent is expressly authorized by his principal, exemplary damages may be assessed against the principal.[36] There is comparatively little difficulty in determining what facts show express authorization of a malicious tort, so as to render a principal liable in exemplary damages; but, on the question what constitutes such ratification as to afford a basis for the assessment of exemplary damages against a principal, there is more of difficulty and hence more of adjudication. The retention of the agent in the employ of the principal after the principal has notice of the tort is often held to be such a ratification as to make the principal liable in exemplary damages.[37] So it is held also of the retention of the fruits of the agent's tort by the principal.[38]

Many cases hold a principal liable in exemplary damages for malicious or grossly negligent torts of an unskilful, negligent, reckless, or wanton agent employed by the principal.[39]

35—Davis v. Hearst, (1911) 160 Cal. 143, 116 Pac. 530.

36—Denver & R. G. Ry. Co. v. Harris, (1887) 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. ed. 1146.

37—Bass v. Chicago & N. W. Ry. Co., (1877) 42 Wis. 654, 24 Am. Rep. 437.

38—Kilpatrick v. Haley, (1895) 66 Fed. 133, 13 C. C. A. 480, 27 U. S. App. 752; Goddard v. Grand Trunk Railway, (1869) 57 Me. 202, 2 Am. Rep. 39.

39—Henning v. Western Union Telegraph Co., (1890) 41 Fed. 864. Cleghorn v. New York Central, etc., Co., (1874) 56 N. Y. 44, 15 Am. Rep. 375; holding that it was competent, for the purpose of establishing a claim to exemplary damages, to prove that defendant railway's servant was intoxicated at the time of the accident, that he was a man of intemperate habits, and that this latter fact was known to the agent of the corpora-

Where the wantonness of an agent is such as to make the agent liable for his tort, in exemplary damages, the principal is likewise so liable,[40] according to one line of cases. So it has been held that an attorney who seizes property, knowing or having reasonable grounds for believing that it does not belong to the defendant in attachment, renders his client liable to the owner in exemplary damages.[41] Conversely, it is held that no exemplary damages can be recovered against the principal, where no such damages could be recovered of the agent if he were the defendant.[42]

52. **Against Corporations.**—Exemplary damages may be allowed against a private corporation.[43] Courts, however, disagree as to the circumstances under which such allowance may be made. One case lays down the broad principle that "whatever rule of damages would apply in a suit against a natural person ought to apply in a suit against a corporation," stating further: "Any discrimination in that regard would shock the public sense of impartial justice, and would be an unjustifiable innovation. The instructions governing subordinate em-

tion who had power to employ and discharge him.

40—Malloy v. Bennett, (1883) 15 Fed. 371.

"When one person invests another with authority to act as his agent for a specified purpose, all of the acts done by the agent in pursuance, or within the scope, of his agency, are, and should be, regarded as really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is liable, for the act is really done by him."—Rucker v. Smoke, (1892) 37 S. Car. 377, 16 S. E. 40, 34 Am. St. Rep. 758. In most jurisdictions, this reasoning is not regarded as satisfactory.

41—Jones v. Lamon, (1893) 92 Ga. 529, 18 S. E. 423.

42—Townsend v. New York Central, etc., R. Co., (1874) 56 N. Y. 295, 15 Am. Rep. 419.

43—Lake Shore & M. S. Ry. Co. v. Prentice, (1893) 147 U. S. 101, 13 Sup. Ct. 261, 37 L. ed. 97; Press Publishing Co. v. Monroe, (1896) 73 Fed. 196, 19 C. C. A. 429, 38 U. S. App. 410, 51 L. R. A. 353; Goddard v. Grand Trunk Ry., (1869) 57 Me. 202, 2 Am. Rep. 39.

ployees and agents may be devised in such utter disregard of the rights of others, that obedience to them will result in palpable oppression and gross wrong to individuals."[44] Another rule, stated in an Illinois case, is as follows: "If the wrongful act of the agent is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to vindictive damages."[45] Where a malicious tort is brought home to the corporation's managing officials, by proof either of authorization or of ratification by them, it is generally held that the assessment of exemplary damages is proper.[46] As the corporation has no mind and cannot therefore itself entertain malice, exemplary damages could never be assessed against a corporation in the absence of such a rule. But some cases go

44—Jeffersonville v. Rogers, (1867) 28 Ind. 1, 92 Am. Dec. 276. So also in Lake Shore & M. S. Ry. Co. v. Prentice, supra; and Times Publishing Co. v. Carlisle, (1899) 94 Fed. 762, 36 C. C. A. 475.

"Artificial, as they may be, there is still a human intelligence and volition controlling their affairs just like those of an individual, and which may act wrongfully, maliciously, and recklessly, thus laying the basis for exemplary damages. Whatever may have been the doctrine anciently, it is now too well settled to be uprooted, that corporations like these defendants, which are established and conducted in whole or in part for the pecuniary benefit of the members, are liable in actions for torts in the same way, and to the same extent as individuals or natural persons." Western Union Telegraph Co. v. Eyser, (1873) 2 Col. 141, (161-162), using in part the words of the Jeffersonville case, supra. This is a clear statement of the law in most states, though the case has since been overruled as to the allowance of exemplary damages at all at common law in Colorado.

45—Singer Mfg. Co. v. Holdfodt, (1877) 86 Ill. 455, 29 Am. Rep. 43.

46—Press Publishing Co. v. Monroe, (1896) 73 Fed. 196, 19 C. C. A. 429, 38 U. S. App. 410, 51 L. R. A. 353; Goddard v. Grand Trunk Ry., (1869) 57 Me. 202, 2 Am. Rep. 39; Bingham v. Lipman, Wolfe & Co., (1901) 40 Ore. 363, 67 Pac. 98.

Conversely, it is held that, where a corporation's chief officers neither authorize nor ratify a malicious tort, the corporation is not liable in exemplary damages. Lake Shore & M. S. Ry. Co. v. Prentice, (1893) 147 U. S. 101, 13 Sup. Ct. 261, 37 L. ed. 97; Sun Life Assurance Co. v. Bailey, (1903) 101 Va. 443, 44 S. E. 692.

farther and allow such damages to be recovered of a corporation for malicious acts of servants, committed without special authorization or ratification by the managing officials.[47] Of course, such would always be the holding in a state where the principal's liability is determined merely by the fact of liability of the agent.[48] In cases where a railroad corporation is defendant, courts have sometimes considered the fact that the corporation is in a public business and that the assessment of exemplary damages would be conducive to a more complete fulfilment of its public duties.[49]

Exemplary damages are not generally allowed against municipal corporations.[50]

53. **Joint Defendants.**—"Damages of this nature, if ever recoverable against several defendants, are recoverable only when all are shown to have been moved by a wanton desire to injury."[51] "Where two are sued for a trespass, and one has so acted as to become thus liable and the other not, to recover such damages the suit should be against the party alone who incurs the liability,"[52]

47—Louisville & N. R. Co. v. Garrett, (1881) 8 Lea (Tenn.) 438, 41 Am. Rep. 640.

48—Ante, p. 125.

49—Goddard v. Grand Trunk Ry., (1869) 57 Me. 202, 2 Am. Rep. 39.

50—Chicago v. Langlass, (1869) 52 Ill. 256, 4 Am. Rep. 603; Bennett v. Marion, (1897) 102 Ia. 425, 71 N. W. 360, 63 Am. St. Rep. 454.

"It is scarcely conceivable that a case could be made against a municipal corporation, justifying punitive damages."—Breese, J., in Chicago v. Martin, (1868) 49 Ill. 241, 95 Am. Dec. 590.

"While exemplary damages may, in a proper case, be recovered for a willful injury to land, the case would be exceptional, indeed, when vindictive or more than compensatory damages can be recovered against a municipal corporation."—Ostrom v. City of San Antonio, (1903) 33 Tex. Civ. App. 683, 77 S. W. 829.

51—Boutwell v. Marr. (1899) 71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746. See also Krug v. Pitass, (1900) 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317.

52—Becker v. Dupree, (1874) 75 Ill. 167. Contra: St. Louis S. W. Ry. Co. v. Thompson, (1908) 102 Tex. 89, 113 S. W. 144; Louis-

although some courts have held *contra*. But, at common law, it has been held that exemplary damages are recoverable against husband and wife in an action against them for the malicious trespass of the wife, although the husband is free from improper motive or other blame in the premises. This decision is on the ground of the common law oneness of husband and wife.[52a]

54. **Evidence of the Wealth of Defendant Admissible.**—In most actions, evidence of the wealth of the defendant is inadmissible; but, in cases involving the assessment of exemplary damages, such evidence is admitted.[53] This is for the purpose of determining how much in damages must be assessed in order really to punish the defendant.

55. **Admissibility of Evidence of the Poverty of the Plaintiff.**—Evidence of the plaintiff's poverty is, on principle, never admissible for the purpose of enhancing exemplary damages, and some courts so hold.[54] The fact that the plaintiff is poor does not in any way affect the question what amount of damages is necessary in order to punish the defendant. But there is much authority to the effect that evidence of the pecuniary condition of the plaintiff is admissible in cases wherein exemplary damages are proper.[55]

ville & N. R. Co. v. Roth, (1908) 130 Ky. 759, 114 S. W. 264, citing earlier cases.

52a—Lombard v. Batchelder, (1886) 58 Vt. 558, 5 Atl. 511.

53—Chellis v. Chapman, (1891) 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

54—Robertson v. Conklin, etc., Co., (1910) 153 N. Car. 1, 68 S. E. 899, 138 Am. St. Rep. 635.

55—Cochran v. Ammon, (1855) 16 Ill. 316; White v. Murtland, (1874) 71 Ill. 250, 22 Am. Rep. 100; Beck v. Dowell, (1892) 111 Mo. 506, 20 S. W. 209, 33 Am. St. Rep. 547; Heneky v. Smith, (1882) 10 Ore. 349, 45 Am. Rep. 143.

CASE ILLUSTRATIONS

1. Defendant broke his contract, by which he had agreed to employ plaintiff to cultivate a farm on shares. An instruction that the jury may assess damages "for violation of faith" in addition to damages for the breach, is bad as authorizing the assessment of vindictive damages, which is not allowed in contract, with very rare exceptions.[56]

2. Defendant, a physician, and others, got plaintiff, a foreigner, intoxicated. Plaintiff was then induced to drink a glass of wine, into which defendant put a large portion of cantharides, from which plaintiff was made ill for a fortnight. He was not free from the effects of the drug for several months after. "Notwithstanding it was called a frolic, yet the proceedings appeared to be the result of a combination, which wrought a very serious injury to the plaintiff, and such a one as entitled him to very exemplary damages, especially from a professional character, who could not plead ignorance of the operation and powerful effects of this medicine." [57]

3. Defendant, a banker, a magistrate, and a member of parliament, who had been drinking too freely, trespassed upon plaintiff's land, hunting, and using intemperate and threatening language toward plaintiff, who had told him to leave the premises. This is a case for exemplary damages. A verdict for the plaintiff in the sum of £500, the whole amount named in the declaration, is sustained.[58]

4. Defendant entered plaintiff's house with force and took plaintiff's chattels. Whether the assessment of punitive damages is warranted, is a question for the jury. Such damages may be assessed, if the trespass was wanton, wilful, or malicious, or accompanied with such acts of indignity as to show a reckless disregard of the rights of others.[59]

5. Defendant illegally and wantonly took plaintiff's horse and dray, and detained them without cause, despite the repeated demands of plaintiff that he return them. This is a proper case for exemplary damages. The defendant's conduct evinced an

56—Hoy v. Gronoble, (1859) 34 Pa. 9, 75 Am. Dec. 628.

57—Genay v. Norris, (1784) 1 Bay (S. Car.) 6.

58—Merest v. Harvey, (1814) 5 Taunt. 442, 128 Eng. Repr. 761.

59—Cutler v. Smith, (1870) 57 Ill. 252.

obstinate determination to take justice into his own hands. There was no evidence whatever to sustain defendant's claim of right.[60]

6. Defendants notified plaintiff and his customers that they held a patent on certain goods made by plaintiff, that plaintiff was infringing the patent, and that they would bring suit if plaintiff continued to make, or his customers to buy, such goods. Defendants held no such patent, their patent on such goods having expired. The assessment of punitive damages is proper. Defendants had no reasonable ground to believe the statements to be true at the time they issued them.[61]

7. Defendant express company undertook to carry plaintiff's piano, which, as it was notified, was to be used at once in plaintiff's show. Plaintiff further notified defendant that any delay would result in a loss to him of $200 per night. Defendant, showing a reckless disregard of plaintiff's rights, delayed the piano for four days. Verdict for $200 compensatory and $500 exemplary damages. Judgment on verdict affirmed.[62]

8. Defendant negligently permitted a vicious ram to run at large. It inflicted injuries on plaintiff. "Exemplary damages in cases of this nature can only proceed from gross and criminal negligence—such negligence as evinces on the part of the defendant a wanton disregard of the safety of others, and which is in law equivalent to malice."[63]

9. Defendant negligently ran his automobile into plaintiff's buggy, in which plaintiff was riding. There was evidence tending to show that defendant could have prevented his automobile from striking, but that he took off his brake and put on all the power he had, with the purpose of going through the buggy. The judgment of the court below, on a verdict for $50 actual, and $100 exemplary damages, is affirmed. "We think defendant had a fair trial and got off light."[64]

10. During a storm in the night, defendant, operating a city

60—Summers v. Baumgard, (1836) 9 La. 161.

61—Stroud v. Smith, (1900) 194 Pa. 502, 45 Atl. 329.

62—Piero v. Southern Express Co., (1916) 103 S. Car. 467, 88 S. E. 269. Not so where there is no malice, fraud, gross negligence, or recklessness on the part of the carrier.—Lord v. Maine Central R. Co., (1909) 105 Me. 255, 74 Atl. 117.

63—Pickett v. Crook, (1866) 20 Wis. 358.

64—Williams v. Baldrey, (Okla. 1915) 152 Pac. 814.

electric lighting system, discovered that its current was grounded somewhere. Defendant continued to run its plant as usual. A few hours after daylight, when a number of persons were on the street, plaintiff's intestate was killed by contact with the grounded wire, on a street crossing. Held, that such negligence was shown as to warrant the assessment of exemplary damages.[65]

11. In the rear end of defendants' store, a freight elevator was maintained, with a shaft door opening upon a platform in the alley. Plaintiffs' son, bringing goods to defendants, mistook this door for a rear entrance, opened it, walked into the shaft, fell to the bottom, and was killed. There was not such negligence of defendants shown here as to justify the assessment of exemplary damages.[66]

12. In the course of mining operations, defendant wrongfully diverted, corrupted and poisoned water of a stream, to the injury of plaintiff, who brought action and procured a judgment. Still, defendant continued the nuisance. In a second action, for the continuance of the wrong, the plaintiff may obtain exemplary damages.[67]

13. Defendant's building overhung plaintiff's lot and delayed him in the building of a store and office building. Defendant believed that plaintiff was responsible for the overhanging. He delayed removing the projection, even after issuance of a decree compelling him to remove it; but this delay was due to attempts to devise some means of remedying the wall without causing great injury to his own wall. There is no ground for giving exemplary damages.[68]

14. Plaintiff demanded the use of a telephone of defendant telephone company, which the latter refused, except on condition that plaintiff would consent to a prohibition of a joint use of the Bell telephone, which plaintiff refused to do. Defendant mistakenly supposed it had a right to require acquiescence in this condition. In an action brought because of defendant's refusal,

65—Texarkana Gas & Electric Light Co. v. Orr, (1894) 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30.

66—Leahy v. Davis, (1894) 121 Mo. 227, 25 S. W. 941.

67—Long v. Trexler, (Pa. 1887) 8 Atl. 620.

68—Burruss v. Hines, (1897) 94 Va. 413, 26 S. E. 875.

it is held that exemplary damages cannot be recovered, as defendant was merely asserting what it believed to be its right.[69]

15. A landlord went upon rented premises before the tenant's term ended, broke open a locked building, and took therefrom his tenant's cotton, against his remonstrance. Punitive damages may be awarded, although the cotton be bound for supplies which the landlord has furnished, and though such forcible seizure of it be made for the purpose of selling it, and though it be fairly sold, and the proceeds applied to the debt for supplies.[70]

16. Defendant, a mortgagee of the premises in which plaintiff lived, under a mistaken belief as to his legal rights, entered the premises and tore, spoiled, destroyed, and removed articles of furniture. Exemplary damages may be assessed.[71]

17. A lessee, acting under an honest but mistaken belief as to title, took gas from the land. Exemplary damages cannot be allowed.[72]

18. Plaintiff was a passenger on defendant's railroad. He surrendered his ticket to a brakeman, who, in the absence of the conductor, was authorized to demand and receive it. The brakeman afterward approached the plaintiff, and, in language coarse, profane, and grossly insulting, said that plaintiff had neither surrendered nor shown him his ticket. The brakeman called plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot. The brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his

69—Gwynn v. Citizens' Telephone Co., (1904) 69 S. Car. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819. Under all the circumstances of this case, the decision seems at least questionable. Should a public service corporation's belief that it has a right to annex unreasonable conditions to the performance of its duties, avail to protect it from the assessment of exemplary damages for an act in gross disregard of the rights of the public under the first principles of the law of public service corporations?

70—Shores v. Brooks, (1888) 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332.

71—Best v. Allen, (1862) 30 Ill. 30, 81 Am. Dec. 338.

72—Gerkins v. Kentucky Salt Co., (1902) 23 Ky. Law 2415, 100 Ky. 734, 67 S. W. 821, 66 Am. St. Rep. 370.

face, and, shaking it violently, told him not to yip, if he did, he would spot him, that he was a damned liar, that he never handed him his ticket, that he did not believe he paid his fare either way. This misconduct of the brakeman became known to the defendant, but it continued him in its employ, thus practically ratifying his wrongful acts. This is a proper case for exemplary damages. Verdict for $4,850 upheld.[73]

19. A conductor on defendant's train suddenly and violently seized the plaintiff, a lady passenger, put his arms about her, and repeatedly kissed her, although she strongly protested. Defendant immediately discharged the conductor. Judgment for plaintiff for $1,000 affirmed, but only on the ground that it was fair compensation. Exemplary damages cannot be assessed where the principal is not a party to the malice of the agent.[74]

20. Plaintiff, a passenger on defendant's train, bought the tickets of several passengers, which were not in terms non-transferable. The conductor, because of this, telegraphed for a police officer, who boarded the train as it approached its destination. The conductor pointed out plaintiff, ordered his arrest, searched him for weapons, placed him under guard in another car, and would not permit him to tell the cause of his arrest or to speak with his wife. During the removal of the plaintiff from the car, the conductor said to the plaintiff's wife, "Where's your doctor now?" Plaintiff was not permitted to assist his wife with her parcels on arriving at destination, and he was forcibly taken to the station house, where he was detained until the conductor arrived. The conductor then filed a false charge against him. He was released on bail; and, on his trial, no one appearing against him, he was discharged. Held, that this is not a case for exemplary damages, unless the offense be brought home to the persons wielding the executive power of the corporation.[75]

73—Goddard v. Grand Trunk Railway, (1869) 57 Me. 202, 2 Am. Rep. 39.

74—Craker v. Chicago & N. W. Ry. Co., (1875) 36 Wis. 657, 17 Am. Rep. 504.

75—Lake Shore & M. S. Ry. Co. v. Prentice, (1893) 147 U. S. 101, 37 L. ed. 97, 13 Sup. Ct. 261.

CHAPTER XII

Aggravation and Mitigation [1]

56. **Aggravation** is the adding to or making heavier of compensatory damages for non-pecuniary loss, and of exemplary damages. Both non-pecuniary compensatory damages and exemplary damages are largely in the discretion of the jury; and it is proper that the jury consider facts and circumstances in connection with the wrong. A compensatory element of damage may be aggravated by circumstances which tend to make greater the damage growing out of the wrong. For instance, the compensation for an assault and battery may be increased because of the fact that the injury is rendered greater by being perpetrated before a large crowd, so as to humiliate the plaintiff and cause him mental suffering. Exemplary damages may be aggravated by facts tending to show a higher degree of malice. The aggravation of damages by the fact of defendant's wantonness is sometimes put upon the ground that this fact really makes the injury greater.[2]

57. **Mitigation** is the lessening of non-pecuniary compensatory damages or of exemplary damages. Any circumstance tending to show that actual non-pecuniary damage is less, tends to mitigate compensatory damages; and any circumstance tending to show lack of malice or a lesser degree of malice, tends to eliminate or

1—A complete exposition of the principles herein set forth is not attempted here, as much is said on the matter in chapters devoted to specific wrongs.

2—Meagher v. Driscoll, (1868) 99 Mass. 281, 96 Am. Dec. 759.

to lessen exemplary damages. The lessening of pecuniary damage is also frequently spoken of as mitigation, as in a case wherein an employee's pecuniary loss consequent upon wrongful discharge is diminished by his acceptance of other employment.

In mitigation, defendant may show that his act has been a benefit, and not an injury, to the plaintiff. So, where the suit is to recover possession of land and damages for wrongful holding of it by defendant, the latter has a right to prove in mitigation that he has erected on the land a house, which the plaintiff will recover along with the land in the event of a verdict for the plaintiff.[3]

Provocation of defendant by acts of plaintiff may be shown in mitigation of exemplary damages, and it has even been said to preclude exemplary damages.[4] So, where the plaintiff was guilty of gross misconduct and fraud against the defendant, and the latter, under provocation of the wrong and without malicious motive, caused a false imprisonment of the plaintiff, exemplary damages for the imprisonment are mitigated by evidence of such provocation.[5] But words of provocation neither justify an assault nor mitigate compensatory damages therefor.[6] Words of provocation on another occasion

3—Meier v. Portland Cable Ry. Co., (1888) 16 Ore. 500, 19 Pac. 610, 1 L. R. A. 856.

4—Donnelly v. Harris, (1866) 41 Ill. 126; Kiff v. Youmans, (1881) 86 N. Y. 324, 40 Am. Rep. 543; Brown v. Swineford, (1878) 44 Wis. 282, 28 Am. Rep. 582.

5—Johnson v. Von Kettler, (1872) 66 Ill. 63.

6—Hendle v. Geiler, (Del. 1895) 50 Atl. 632; Donnelly v. Harris, (1866) 41 Ill. 126; Irlbeck v. Bierl, (1896) 101 Ia. 240, 67 N. W. 400; Lund v. Tyler, (1901) 115 Ia. 236, 88 N. W. 333; Prentiss v. Shaw, (1869) 56 Me. 427, 96 Am. Dec. 475; Johnson v. McKee, (1873) 27 Mich. 471; Goucher v. Jamieson, (1900) 124 Mich. 21, 82 N. W. 663; Osler v. Walton, (1901) 67 N. J. Law 63, 50 Atl. 590; Palmer v. Winston-Salem R., etc., Co., (1902) 131 N. Car. 250, 42 S. E. 604; Mahoning V. R. Co. v. De Pascale, (1904) 70 O. St. 179, 71 N. E. 633, 65 L. R. A. 860, 1 Ann. Cas. 896; Goldsmith's Adm'r v. Joy, (1889) 61 Vt. 488, 17 Atl. 1010, 4 L. R. A. 500, 15 Am. St. Rep. 923; Willey v. Carpenter, (1892) 64 Vt. 212, 23 Atl. 630, 15 L. R. A. 853; Wilson v. Young, (1872) 31 Wis. 574.

than that of defendant's offense, are not admissible in mitigation.[7] In case of assault, if the assault has not immediately followed plaintiff's provocation, such provocation cannot be considered in mitigation. If defendant's "blood has had time to cool," provocation does not mitigate damages for assault.[8]

Where defendant has fairly stated all the facts to his counsel, the advice of counsel, while it does not justify defendant's subsequent unlawful act, may be considered in mitigation of exemplary damages.[9] But advice of counsel cannot mitigate compensatory damages.[10]

58. **Contributory Negligence.**—Where the contributory negligence of the plaintiff does not bar the action altogether, it is proper to consider it in mitigation of damages.[11] Many statutes have declared the same rule, notably the federal employers' liability act as to interstate common carriers, under which this matter becomes one of great importance. This act provides that contributory negligence of an employee shall not bar recovery, but that damages shall be diminished in proportion to the amount of negligence attributable to the employee. But the statute completely wipes out the defense of contributory negligence in all cases wherein the violation by

7—Baltimore & O. R. Co. v. Barger, (1894) 80 Md. 23, 30 Atl. 560, 26 L. R. A. 220, 45 Am. St. Rep. 319.

"It is not the motive or the feelings under which the legal wrong is committed, which determines the character of the act, or the amount of the actual damages resulting from it."—Prentiss v. Shaw, supra.

8—Carson v. Singleton, (1901) 23 Ky. Law 1626, 65 S. W. 821; Corning v. Corning, (1851) 6 N. Y. 97; Stetlar v. Nellis, (1871) 60 Barb. (N. Y.) 524; Davis v. Collins, (1904) 69 S. Car. 460, 48 S. E. 469.

9—Shores v. Brooks, (1888) 81 Ga. 468, 8 S. E. 429, 12 Am. St. Rep. 332.

10—Sutherland on Damages, 4th ed., § 150, citing Richards v. Sanderson, (1907) 39 Colo. 270, 89 Pac. 769, 121 Am. St. Rep. 167.

11—Flanders v. Meath, (1859) 27 Ga. 358; Lord v. Carbon Iron Mfg. Co., (1886) 42 N. J. Eq. 157, 6 Atl. 812; Louisville & N. R. Co. v. Conner, (1872) 49 Tenn. 382.

the employer of any statute for the safety of employees has contributed to the injury or death of the employee.[12]

CASE ILLUSTRATIONS

1. Defendant committed an assault and battery upon the plaintiff. Held, that the insult and indignity inflicted upon the plaintiff by giving him a blow with anger, rudeness, or insolence, ought to be considered as an aggravation of the tort.[13]

2. A silk manufacturer sues a physician for slander, charging that defendant falsely told plaintiff's workmen that there was arsenic in the silk worked within plaintiff's factory. As a result of the slander, plaintiff, who was in the employ of a company, had to remain away from the company's work for eight days, but the company made no deduction for his lost time. Held, that the fact of this non-deduction cannot be considered in mitigation. "The plaintiff does not recover because he was compelled to break his contract with the company, but for his own time and trouble, irrespective of his contracts. His cause of action for that could not be affected if a stranger saw fit to pay him for the same time, either by way of gift or upon consideration." [14]

12—U. S. Ann. Stat. 1916, § 8659.

13—Smith v. Holcomb, (1868) 99 Mass. 552.

14—Elmer v. Fessenden, (1891) 154 Mass. 427, 28 N. E. 299. So held where plaintiff, disabled by defendant's wrong, was paid by his employer an amount equal to his salary during the period of his absence from work.—Nashville, C. & St. L. Ry. Co. v. Miller, (1904) 120 Ga. 453, 47 S. E. 959, 67 L. R. A. 87. 1 Ann. Cas. 210.

CHAPTER XIII

Conflicts of Laws

59. **In General.**—It would seem to be an elementary principle of conflicts of laws that a plaintiff cannot increase his substantive rights by any choice of jurisdiction in which to bring suit, and it is usually so held. Substantive rights are generally determined by the law of the place in which or by virtue of whose rules of law they accrue. It seems only in accord with reason to say that a right to have damages assessed is a substantive right; and it is such, according to the weight of authority. The measure of damages, in contract or in tort, is a mere incident to the liability to which it attaches, and must be determined by the law of the place whose law creates the right to damages.[1]

Throughout this field, however, there are numerous considerations that affect the decisions. A right totally different from any right given by the law of the *forum* and incompatible with any remedy of the law of the *forum,* will not be enforced.[2]

60. **Contracts.**—In contract, the measure of damages, like other matters of substantive right, is determined by the intention of the parties, and may be according either to the law of the place of contracting or the law of the place of performance. Ordinarily, the measure of damages for breach of contract to convey land is governed by the law of the place where the land is situated. Us-

1—Mills v. Dow, (1890) 133 U. S. 423, 33 L. ed. 717, 10 Sup. Ct. 413; Bruce v. Cincinnati R. Co., (1885) 83 Ky. 174. See Sedg. Dam. (9th ed.) § 1373.

2—Slater v. Mexican National R. Co., (1904) 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. 581.

ually in contract, the law of the place where the breach takes place governs as to damages, the law of such place being both the law contemplated by the parties and the law of the place where the wrong is committed. But the measure of damages may be determined according either to the law of the place of contracting or to the law of the place designated for performance, according to the intention of the parties.[3]

A fruitful source of litigation as to the measure of damages, and especially as to what law governs such measure, has been contracts to transmit and deliver telegrams. Of course, on principle, the law of the forum should not affect the measure of damages, and so it is usually determined in these cases, as in others. The cases presenting most difficulties have, in the past, been those based upon contracts to transmit messages from one state to another. This field was in a state of confusion up to the comparatively recent time of the passage of a federal statute bringing telegraph companies into the category of common carriers of interstate business and making them amenable to federal law. Under these statutes, it is held that damages for breach of a telegraph company's contract to transmit an interstate message are governed, not by any state law, but by federal law.[4]

61. **Torts.**—In tort, the measure of damages is usually held to be governed by the law of the place where the

3—See Mills v. Dow, (1890) 133 U. S. 423, 33 L. ed. 717, 10 Sup. Ct. 413.

Interest agreed upon by the parties is governed by the law of the place where it is contracted for and is to be paid.—Winthrop v. Carleton, (1815) 12 Mass. 4. Such interest is given because of the agreement of the parties. But interest given by way of damages has sometimes been held to be a remedial matter, governed by the law of the forum.—Barringer v. King, (1855) 5 Gray (Mass.) 9.

4—Act Cong. June 10, 1910, c. 309, 36 Stat. 539; Western U. Tel. Co. v. Hawkins, (Ala. 1917) 73 So. 973; Western U. Tel. Co. v. Showers, (Miss. 1916) 73 So. 276.

tort was committed, and it would seem that this would be the only possible sound rule on this subject.[5]

CASE ILLUSTRATIONS

1. A's administrator sues in Illinois for the wrongful death of A in Canada, where there is a statute allowing recovery in such cases, without stated limit. In Illinois, there is a statutory limit of $5,000 in such cases. Held that the Illinois statute does not limit recovery in this case.[6]

2. Plaintiff's husband died of personal injuries negligently inflicted by defendant in Pennsylvania, where damages were not restricted. By the law of New York, the state of the *forum*, damages in such cases were restricted to $5,000. Held, that the action could be maintained in New York, but that New York's limitation to $5,000 applied.[7]

3. Plaintiff brings action in Vermont for injuries received while in defendant's employ in Quebec. Held, that the measure of damages is governed by the law of Quebec.[8]

4. Plaintiff was a passenger on one of defendant's trains, her entire trip being within the state of Massachusetts. Held, in an action for loss of her baggage, that a law of New York, the state of the *forum*, exempting the carrier from all damages for loss of baggage in excess of $150 value, does not apply.[9]

5—Northern Pacific R. Co. v. Babcock, (1893) 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. 978; Hanna v. Grand Trunk Ry. Co., (1891) 41 Ill. App. 116. This seems correct, but there are holdings contra. See Wooden v. Western N. Y., etc., R. Co., (1891) 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803.

6—Hanna v. Grand Trunk Ry., (1891) 41 Ill. App. 116.

Rev. Stat. Ill. 1917, Chap. 70, § 2, however, has since prohibited the bringing of actions in Illinois for deaths occurring outside the state.

7—Wooden v. Western New York, etc., R. Co., (1891) 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803.

8—Osborne v. Grand Trunk Ry. Co., (1913) 87 Vt. 104, 88 Atl. 512, Ann. Cas. 1916 C 74. Accord: Northern Pacific R. Co. v. Babcock, (1893) 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. 978; Slater v. Mexican National R. Co., (1904) 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. 581.

9—Hasbrouck v. New York Central, etc., R. Co., (1911) 202 N. Y. 363, 95 N. E. 808, 35 L. R. A. (N. S.) 537, Ann. Cas. 1912 D 1150.

5. Defendant contracted in Mississippi to transmit a telegraph message from plaintiff to plaintiff's daughter in Kentucky. Held, that the measure of damages for negligent delay in delivery, under federal statutes, is determined by federal law.[10]

10—Western U. Tel. Co. v. Showers, (Miss. 1916) 73 So. 276.

CHAPTER XIV

General Principles of Pleading and Practice

62. **Damage as the Gist of an Action.**—There are some wrongs of such a nature that the very fact of their perpetration imports injury, in the legal sense, it being certain that such a wrong cannot be committed without inflicting damage. In a case involving such a wrong, mere general pleading of the wrong in the declaration is sufficient notice to the defendant that damage has resulted from the wrong alleged. Pleading specially the damage is not necessary in such an action; that is, the very fact that the wrong is committed imports damage, so that, without any special allegation showing just how he is damaged, the plaintiff can set up a general statement of the wrong, and this entitles him, upon proof, to at least nominal damages. Familiar examples of such wrongs are: breach of contract, battery, the use of words that are libelous or slanderous *per se,* trespass to realty, and conversion.[1]

Many wrongs are such that the mere fact of their commission does not show any right of action in any one. Negligence is committed millions of times each day, with damage to only a comparatively few persons. The vast majority of persons guilty of negligence cannot be sued for their negligence, because they have, despite their neglect of duty to others, done no damage. In fact, negligence is not usually a legal wrong at all, unless it results in damage. Nuisance, fraud, and many other

1—"Every injury imports damage in the nature of it; and, if no other damage is established, the party is entitled to a verdict for nominal damages."—Mayor of Lynn v. Mayor of London, (1791) 4 T. R. 130, 100 Eng. Repr. 933; cited in Webb v. Portland Mfg. Co., (1838) Fed. Cas. 17,322, 3 Sumn. 189.

wrongs, may or may not cause damage, and so the mere allegation of the wrong, without special allegation of damage, does not make out a cause of action.[2]

63. **General and Special Damages.**[3]—When a defendant is summoned to plead to a declaration, it is not only good law, but the soundest common sense, to say that the declaration is complete and sufficient notice to him of the plaintiff's claim for all damage which necessarily results from the general wrong set up in the declaration. Compensation for the damage necessarily resulting from the general wrong alleged is known as general damages.

There are, in many cases, elements of damage that are not necessary results of the wrong alleged. Damages cannot be awarded for such elements without notifying the defendant, by the declaration, that compensation for them is claimed. It is obvious that, if the plaintiff were allowed to recover for results that are not the necessary or usual results of the wrong that is merely generally alleged in the declaration, the defendant would often be surprised and destitute of any opportunity to gather evidence to rebut that introduced on the trial. Compensation for unusual proximate results of a wrong must therefore always be grounded in special pleading and proof. Such compensation is known as special damages.

The necessity of special pleading of damage comes up in two kinds of cases: first, those in which damage is the

2—"No legal injury is caused * * * when there is no special damage if special damage is an element of the legal injury, as in slander not per se, nuisance, fraud, negligence, removal of lateral support, procuring refusal of breach of contract, slander of title, malicious prosecution not defamatory." —Willis on Damages, p. 17.

3—"Special damages" must not be confused with "special damage." The latter is particular damage suffered by the plaintiff because of a wrong also generally damaging others, as in the case of a public nuisance. Where a nuisance causes damage to a whole neighborhood, one resident cannot maintain an action therefor, unless he can show special damage.

gist of the action, so that no recovery whatever can be had without special pleading; and second, those in which the general statement of the wrong imports damage, but in which the plaintiff desires to recover for other elements of damage than those usually resulting in such a case. In the first type, the right to damages is grounded entirely in special pleading; in the second, the right to damages is grounded partly in the general statement of the cause of action and partly in special pleading of elements of damage in regard to the claim of which a mere general statement gives no notice.[4]

Among special damages recoverable, if properly pleaded, are damages for liability incurred but not paid, for reasonable and necessary expenses caused by the wrongful act complained of, such as the fees of an attorney employed to obtain a discharge from an illegal arrest, physicians' bills incurred for a cure of bodily injuries, and the like.[5]

CASE ILLUSTRATIONS

1. Defendant leased a store building to plaintiff for one year, but later leased to other parties and refused to give plaintiff possession. Held, that plaintiff may recover the difference between the rent to be paid and the value of the term at the time of the breach, without specially pleading the loss of such difference. Such damage is presumed.[6]

2. Defendant bank wrongfully refused payment of plaintiff's checks. Held, that plaintiff, having averred and proved that it was a trader and that its checks were wrongfully dishonored by defendant, the law presumes damage to plaintiff's financial reputation and credit.[7]

4—The principles of this subject are further brought out by portions of chapters on various particular wrongs.

5—Donnelly v. Hufschmidt, (1889) 79 Calif. 74, 21 Pac. 546; Nelson v. Kellogg, (1912) 162 Calif. 621, 123 Pac. 1115, Ann. Cas. 1913 D 759.

6—Green v. Williams, (1867) 45 Ill. 206.

7—J. M. James Co. v. Continental National Bank, (1900) 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255.

PART II

COMPENSATION AND ITS ELEMENTS

CHAPTER XV

Compensation in General

64. **The Amount of Damages** assessed in favor of the plaintiff, against the defendant, is usually intended to be commensurate with the amount of damage actually and certainly suffered by the plaintiff as a result of defendant's wrong, i. e., as a result so connected causally with the wrong as to warrant holding defendant liable for it.[1] All damages awarded are by way of compensation, except exemplary damages, properly so called,[2] and

1—"As to the question respecting the measure of damages, it is a general and very sound rule of law, that where an injury has been sustained for which the law gives a remedy, that remedy shall be commensurate to the injury sustained."—Rockwood v. Allen, (1811) 7 Mass. 254.

"Every one shall recover damages in proportion to his prejudice which he hath sustained."—Holt, C. J., in Ferrer v. Beale, (1701) 1 Ld. Raym. 692, 91 Eng. Repr. 1361.

"The rule of recovery is compensation."—Leeds v. Metropolitan Gas Light Co., (1882) 90 N. Y. 26.

"The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. In some instances he is made to bear a part of the loss, in others the amount to be recovered is allowed, as a punishment and example, to exceed the limits of a mere equivalent."—Wicker v. Hoppock, (1867) 6 Wall. (U. S.) 94, 18 L. ed. 752.

See also McMahon v. City of Dubuque, (1898) 107 Ia. 62, 77 N. W. 517, 70 Am. St. Rep. 143; and 8 R. C. L. 431, and cases there cited.

2—Some so-called exemplary damages are really compensatory. See p. 120.

nominal damages merely vindicating plaintiff's right of action. The great principal purpose of the law of damages is to give compensation for the damage inflicted upon the plaintiff by the defendant.

65. "**'Compensatory Damages' and 'Actual Damages'** are synonymous terms."[3] The former term is, however, clearly preferable to the latter, avoiding, as it does, all confusion with "actual damage" or "actual loss." Compensatory damages are compensation for actual damage.

66. **Pecuniary Condition of the Parties as Affecting the Amount of Compensation.**—Ordinarily, the wealth or poverty of the parties does not increase or diminish the amount of plaintiff's damage; and so, usually, evidence of the pecuniary condition of the parties is immaterial and inadmissible. But the fact that plaintiff is poor or that defendant is rich, may affect seriously the amount of plaintiff's actual damage, under the peculiar circumstances of the individual case.[4] For instance, in an action by a husband and wife for an assault and battery upon the wife, "pain and suffering may be much greater where, from his pecuniary condition, the husband is unable to furnish medical aid, remedies, apartments and nursing, such as ample means would afford."[5] In some cases, as in slander, the plaintiff's actual damage may be increased by the fact of his own good standing financially and socially.[6] The good financial and social standing of the defendant, in a slander case, may enhance the damage to the plaintiff, because statements made by a

3—Gatzow v. Buening, (1900) 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 17.

4—Cochran v. Ammon, (1855) 16 Ill. 316; Bump v. Betts, (1840) 23 Wend. (N. Y.) 85.

5—Cochran v. Ammon, supra. See also White v. Murtland, (1874) 71 Ill. 250, 22 Am. Rep. 100.

6—Clements v. Maloney, (1874) 55 Mo. 352.

person standing high in his community are more likely to be believed than are statements by other persons.

It is our purpose to treat, in the chapters that follow, the most important kinds of damage in compensation for which damages may be awarded.

CHAPTER XVI

Loss of Time, Wages, and Earning Power

67. **Time.**—Loss of time is very commonly a head of damage in cases of personal injury. It also figures in other tort cases and often appears in actions on contracts. Time is purely a pecuniary element of damage.[1] Proof simply that the plaintiff has lost a certain amount of time as a result of the defendant's wrong, will not entitle the plaintiff to any substantial damages whatever.[2] In arriving at the value of the time lost by the plaintiff by reason of the wrong he has suffered, the jury must be governed by the same rules as to certainty and proximity as in regard to any other element of damage. The jury cannot resort to mere conjecture as to the value of the time lost. Where, however, there is substantially no evidence of the money value of the time lost, it has been held that the court might be justified in telling the jury that the loss of time may be considered in determining the extent of the injury and the amount of damage necessarily suffered therefrom.[3] Although, where loss of certain profits is the proximate and sole result of loss of time, such profits may be taken as a basis for computing the value of plaintiff's time, such is not the case where the profits are uncertain and contingent, and so the plaintiff can recover only the general value of his time, as shown by the evidence.[4] If plaintiff has suf-

1—Leeds v. Metropolitan Gas Light Co., (1882) 90 N. Y. 26. See also Ransom v. New York & E. R. Co., (1857) 15 N. Y. 415.

2—Leeds v. Metropolitan Gas Light Co., supra; Smith v. Whittlesey, (1906) 79 Conn. 189, 63 Atl. 1085; Judice v. Southern Pac. Co., (1895) 47 La. Ann. 255, 16 So. 816.

3—Smith v. Whittlesey, supra.

4—Howe Sewing Machine Co. v. Bryson, (1876) 44 Ia. 159, 24 Am. Rep. 735.

fered special damage through his loss of time, he must specially plead and prove it. A verdict merely as to general damages may rest largely in conjecture, but a verdict based partly or wholly upon special damages, such as may arise from loss of time, must be grounded in proof.[5]

Where a carrier wrongfully refuses to deliver freight to the consignee, who has applied for it and tendered the price of carriage, and the consignee is wrongfully compelled to return and apply again, he is entitled to compensation, not only for the expenditures proximately caused by the wrong, but also for the time consumed by the extra trip to the carrier's office.[6] So also, where a passenger has been wrongfully delayed in carriage or carried beyond his destination, he may recover of the carrier for his loss of time.[7]

68. **Wages or Earnings.**—Wages which the plaintiff has failed to make, because of the injury inflicted upon him by the defendant, may be recovered. The question for the jury, in such cases, is not, "How much *might* the plaintiff have earned but for the accident?" but rather, "How much *would* he have earned?" i. e., in all probability, in view of his earnings to the date of the injury and other relevant known facts appearing in evidence.

5—Smith v. Whittlesey, (1906) 79 Conn. 189, 63 Atl. 1085, treating damages from loss of time as being special, says: "An ascertainment of the amount of general damages, or damages implied by law as the necessary results of a bodily injury wrongfully inflicted, is ex necessitate rei largely controlled by conjecture. But, in ascertaining the amount of a pecuniary loss not necessarily a result of the injury but dependent for its existence and amount upon facts and circumstances requiring appropriate evidence, the jury must be governed by such evidence, and, in its absence, are not permitted to resort to mere conjecture."

6—Suth. Dam., 4th ed. § 911, citing Waite v. Gilbert, (1852) 10 Cush. (Mass.) 177.

7—Dalton v. Kansas City, etc., R. Co., (1908) 78 Kan. 232, 96 Pac. 475, 17 L. R. A. (N. S.) 1226; Trigg v. St. Louis, K. C. & N. R. Co., (1881) 74 Mo. 147, 41 Am. Rep. 305; Texas & P. R. Co., v. Pollard, (1884) 2 Willson Tex. Civ. Cas. Ct. App. 424.

Proof must be given of the actual amount plaintiff was earning at the time such earning was interrupted by the injury.[8] However, the fact that plaintiff's earnings are obtained in an occupation that yields varying returns, does not preclude the plaintiff from recovering substantial damages. In such a case, if his earnings do not embrace speculative elements, he has a right to introduce evidence as to amounts he has been earning previously.[9]

69. **Earning Power.**—Not only may the plaintiff recover for wages that he has, at the time of the trial, already been prevented from earning, by the injury; but he may recover for the temporary or permanent injury to his power to get wages or earnings. Here, as elsewhere, the requirement of certainty plays a prominent part. What the value of the plaintiff's earning power would have been but for the injury, is determined partly from evidence as to the wages he was getting at the time of the interruption of his work by the injury, and the temporary or permanent nature of the injury, and partly by evidence of other facts, such as plaintiff's age, habits, health, strength, occupation, and reasonable prospects of increased earnings.[10] The plaintiff has a right to be compensated for "the pecuniary loss sustained through inability to attend to a profession or business, as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life."[11] Where the plaintiff is permanently deprived of his earning power, it becomes impor-

8—Camparetti v. Union Ry. Co., (1904) 88 N. Y. Supp. 425, 95 App. Div. 66.

9—Lund v. Tyler, (1901) 115 Ia. 236, 88 N. W. 333, in which plaintiff was permitted to recover lost earnings, although his occupation was fishing.

10—Richmond & D. R. Co. v. Allison, (1890) 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43.

11—Phillips v. London & S. W. R. Co., (1879) L. R. 4 Q. B. Div. 406.

tant to ascertain as accurately as possible the plaintiff's expectancy of life at the time of the injury.[12]

"The loss of earning power is not always easy of calculation. It involves an inquiry into the value of the labor, physical or intellectual, of the person injured, before the accident happened to him and the ability of the same person to earn money by labor physical or intellectual, after the injury was received.

"The profits of a business with which one is connected cannot * * * be made use of as a measure of his earning power. Such evidence may tend to show the possession of business qualities, but it does not fix their value." [13]

Only where promotion of the plaintiff was reasonably certain at the time of the injury, can the prospect of such promotion be considered in estimating damages.[14]

Only the present worth of earnings which the plaintiff would have made in future years but for the diminution or destruction of his earning power, can be allowed; and it therefore is error for a jury to add up all such future earnings and allow them, with no reduction because they are paid now instead of in the future.[15]

70. **Loss of Physical Power, Independent of Loss of Ability to Earn Money.**—The fact that plaintiff has not used his physical power for the purpose of earning money, does not bar his right to substantial damages for the loss of such power. A married woman may not have used her physical power for the purpose of earning money, but that fact does not bar her right to re-

12—Life tables, in common use among insurance companies, are usually introduced in evidence to show the reasonable expectancy of life of the plaintiff.

13—Goodhart v. Pennsylvania R. Co., (1896) 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

14—Richmond & D. R. Co. v. Allison, (1890) 86 Ga. 145, 12 S. E. 352, 11 L. R. A. 43.

15—Goodhart v. Pennsylvania R. Co., (1896) 177 Pa. 1, 35 Atl. 191, 55 Am. St. Rep. 705.

cover for an injury that prevents her from walking without crutches.[16] One kind of loss of physical power, of no importance as to earnings, is loss or impairment of procreative power; and yet it is an important element of damage, for which immense verdicts are often sustained.[17]

CASE ILLUSTRATIONS

1. Plaintiff, in an action for personal injury, seeks to recover for loss of time and loss of earnings as two separate elements of damage. Held, that there is no logical distinction between the two elements.[18]

2. Plaintiff, a freight conductor, was so injured through the negligence of the railroad company, that he had to have his left arm amputated. Held, that plaintiff can recover for diminished earning capacity.[19]

16—Atlanta St. R. Co. v. Jacobs, (1891) 88 Ga. 647, 15 S. E. 825. See also Colorado Springs, etc., Ry. Co. v. Nichols, (1907) 41 Colo. 272, 92 Pac. 691, 20 L. R. A. (N. S.) 215.

17—St. Louis, I. M. & S. R. Co., (1911) 99 Ark. 265, 137 S. W. 1103, Ann. Cas. 1913 B 141; O'Gara v. St. Louis Transit Co., (1907) 204 Mo. 724, 103 S. W. 54, 12 L. R. A. (N. S.) 840, 11 Ann. Cas. 850.

18—Stoetzle v. Sweringen, (1902) 96 Mo. App. 592, 70 S. W. 911. Wages or earnings are merely the amount that best measures the value of the plaintiff's time.

19—Chicago, B. & Q. R. Co. v. Warner, (1884) 108 Ill. 538, saying: "That both arms are useful to all, and indispensable in most of the avocations of life, is but a part of the common information of mankind in general, and hence it required no other proof to establish it."

CHAPTER XVII

Property

71. **The Loss of Goods or Lands or Rights Therein** is among the most important elements of damage, both in contract and in tort. Such a loss is a pecuniary element of damage, and usually the assessment of damages for it is a comparatively simple matter, there being none of the annoying conjectures and uncertainties so common in the assessment of damages for non-pecuniary elements of loss. The assessment of damages for loss of goods or lands is usually a simpler matter than the assessment of damages for even other pecuniary elements.

In contract, we have the action for breach of covenant against incumbrances and of covenant of title, and many other actions involving damages for loss of property or of property rights. Destruction or taking of property and injury thereto, are among the most usual elements of damage to be compensated for in tort cases. The guiding principle here, as is usual elsewhere, is compensation. Damages are assessed in such sum as to compensate for the loss of property. The details of this subject are more fully developed in other chapters throughout a large portion of this work.[1]

1—See especially: Chapter XXVIII, "Contracts Relating to Real Estate;" Chapter XXIX, "Sales and Contracts to Sell Personalty;" Chapter XL, "Tortious Damage to Realty;" Chapter XLI, "Tortious Damage Pertaining to Personalty."

"For an injury to property resulting in its total loss compensation is recoverable, measured by the value of the property at the time of the loss. * * * For an injury to property resulting in a permanent diminution of value, compensation may be recovered for such diminution."—Sedg. Dam. (9th ed.) § 40. See Sutherland on Damages, §§ 12, 79, 100.

CHAPTER XVIII

Expenses

72. **In General.**—In many cases, expenditures made or liabilities incurred by the plaintiff because of the defendant's wrong, figure prominently as heads of damage. In contract, ordinarily the measure of damages is the value of the contract to the plaintiff if it had been performed,[1] but sometimes this cannot be ascertained, so that it becomes necessary, in order to give the plaintiff some relief, to allow him the amount of his expenditures resulting as natural and probable consequences of entering upon the contract and lost because of the breach thereof. In tort, expenditures resulting proximately from defendant's wrongful act, are recoverable. Throughout the study of the subject, one must bear in mind that the expenditure must have been a proximate result of the wrong, and that it must not have been an avoidable consequence.[2]

73. **Expenditures Resulting from Breach of Contract.**—When it is not possible to ascertain the value to the plaintiff of the contract sued upon, although it has been speciously contended that only nominal damages can be recovered, the plaintiff may recover the amount of expense by him "legitimately and essentially incurred for the purpose" of performing plaintiff's part of the contract, in reliance upon the defendant's performing.[3] But the plaintiff cannot recover for expenses unreasonably incurred by him upon the occasion of the breach. "A person has no right to put others to an expense of such

1—See Chapter XXVII.
2—See Chapters IV and V.
3—Bernstein v. Meech, (1891) 130 N. Y. 354, 29 N. E. 255.

a nature as he would not as a reasonable man incur on his own account."[4] The plaintiff may recover expenditures that he is led on by the defendant to make after defendant's breach, for the purpose of mitigating the loss occasioned to the plaintiff by such breach.[5]

Expenses incurred by a buyer in an honest and reasonable effort to minimize the effects of a breach of warranty by the seller, are an element of damage in an action for the breach.[6]

Where a buyer wrongfully refuses to accept goods purchased and shipped to him according to terms of the contract, the seller is entitled to be reimbursed for the freight charges which he has paid;[7] and, where such breach occurs before shipment of goods, the seller may recover for necessary cost of storage.[8]

74. **Expenditures Resulting from Tort.**—Torts often necessitate the expenditure of money by the plaintiff for the purpose of repairing the injury or of avoiding or mitigating injurious consequences of the defendant's wrong.

Where property is injured, the plaintiff has a right to compensation for money reasonably expended in good faith in an effort to save the property as well as for the loss of the property itself, even if, after all attempts to save the property, its loss is total, since "plaintiff is entitled to a fair indemnity for his loss." It can be said of such expenditure that "it was incurred, not to aggravate, but to lessen the amount for which the de-

4—Ward's Central, etc., Co. v. Elkins, (1876) 34 Mich. 439, 22 Am. Rep. 544.

5—Murphy v. McGraw, (1889) 74 Mich. 318, 41 N. W. 917.

6—Kelly v. Cunningham, (1860) 36 Ala. 78; Nye & Schneider Co. v. Snyder, (1898) 56 Neb. 754, 77 N. W. 118; Perrine v. Serrell, (1864) 30 N. J. Law 454.

7—Minneapolis Threshing Machine Co. v. McDonald, (1901) 10 N. Dak. 408, 87 N. W. 993.

8—Ellithorpe Air Brake Co. v. Sire, (1890) 41 Fed. 662; affirmed, 137 U. S. 579, 34 L. ed. 801, 11 Sup. Ct. 195.

fendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just * * * that they should sustain the loss."[9]

In tort, one may recover for expenditures reasonably made for the purpose of mitigating the effects of the wrong.[10]

Where property of the plaintiff has been wrongfully taken and detained by the defendant, the plaintiff has a right to reimbursement of the money expended in a reasonable and *bona fide* attempt to find the property.[11]

In cases of personal injury, on the same general principle, the plaintiff has a right to recover the amount of all expenses incurred reasonably and in good faith in order to repair the injury inflicted by the defendant or to avoid injurious consequences thereof. Such expenses are: physicians' fees, nurses' fees, hospital bills, and druggists' bills.

Besides showing that expenditures of such a nature were, in general, necessary, the plaintiff must prove two things: "First, that he had paid or become liable to pay a specified amount; and, second, that the charges made were the usual and reasonable charges for services of that nature. He could recover no more than the amount which he had paid or become liable to pay, even if it was less than the usual and reasonable charge for such services; and, on the other hand, he could not recover more than such usual and reasonable charge even if he had paid more."[12]

9—Watson v. Bridge, (1837) 14 Me. 201, 31 Am. Dec. 49; cited with approval in Ellis v. Hilton, (1889) 78 Mich. 150, 43 N. W. 1048, 6 L. R. A. 454, 18 Am. St. Rep. 438. Both these actions were brought for injuries to horses, after plaintiffs had attempted their cure.

10—Ocean S. S. Co. v. Williams, (1882) 69 Ga. 251; Bolton v. Vellines, (1897) 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

11—Mitchell v. Burch, (1871) 36 Ind. 529.

12—Schmitt v. Kurrus, (1908) 234 Ill. 578, 85 N. E. 261.

CASE ILLUSTRATIONS

1. Defendants broke their contract not to sell certain patent medicine in certain territory assigned to plaintiffs. Damages cannot be awarded to cover plaintiffs' cost of extra advertising considered necessary to protect their interests from defendants' wrongful competition, nor for the amount lost by reason of a reduction in price deemed necessary in order to counteract the effects of the violation of the contract by defendants.[13]

2. A agreed to transport cordwood for B, but broke his agreement. There was no evidence that the wood was ever delivered to A. The wood was later washed away by a freshet and lost. Held, that it would have been erroneous to instruct the jury that plaintiff could recover "whatever he may have expended in the recovery of the wood washed away, if the jury should believe that the wood would not have washed away had the defendants kept their contract." Such damage was not shown to have arisen naturally from the breach, nor was it shown to have been within the contemplation of the parties as the probable result of a breach.[14]

3. Gas works of defendant injured plaintiff's well, so that he could not use the water for drinking purposes. Held, that evidence was admissible to show the cost to plaintiff of furnishing a sufficient quantity of water equally pure with that which supplied him from his well before its injury by the gas works.[15]

4. Plaintiff's horse was injured by defendant. Held that, in assessing damages, it was proper to consider the sums expended by plaintiff for the treatment of the injured animal and for the hire of a horse to take its place while under treatment.[16]

13—Fowle v. Park, (1892) 48 Fed. 789.

14—Slaughter v. Denmead, (1892) 88 Va. 1019, 14 S. E. 833.

15—Ottawa Gas Light Co. v. Graham, (1862) 28 Ill. 73, 81 Am. Dec. 263.

16—Hutton v. Murphy, (1894) 29 N. Y. Supp. 70, 9 Misc. 151.

CHAPTER XIX

Profits and Bargains

75. **Profits** that defendant's wrong prevents plaintiff from making, may be recovered, if they can be shown in such manner as to bear the tests of the rules of causation and certainty, as may any other element of damages. This is so both in contract and in tort. Although this is clearly just and is correct on principle, it has not always been the rule.[1]

In contract, if the parties have, at the time of contracting, contemplated profits, the amount of such profits lost by reason of defendant's breach, should be assessed against him as damages;[2] and, in tort, if a loss of profits proximately results from defendant's tortious act, such profits can be recovered;[3] provided, however, in all cases, that the requirement of certainty be met.

There are, however, many cases in which the loss of profits is too remote a consequence of defendant's wrongful act, or in which the fact of the loss of the profits or the amount thereof is too uncertain to constitute any basis for a recovery of substantial damages. "It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuation of markets or the chances of business, to enter into a safe or reasonable estimate of dam-

1—Early English and American holdings were to the effect that profits could not be recovered either in contract or in tort.—8 R. C. L. 501.

2—Dennis v. Maxfield, (1865) 10 Allen (Mass.) 138. See Hadley v. Baxendale, (1854) 9 Exch. 341, 5 E. R. C. 502.

3—Allison v. Chandler, (1863) 11 Mich. 542; Paul v. Cragnaz, (1900) 25 Nev. 293, 60 Pac. 983, 47 L. R. A. 540.

ages. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation in itself considered, it has no legal or necessary connection with the stipulations between the parties, and cannot therefore be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach. So a good bargain made by a vendor, in anticipation of the price of the article sold, or an advantageous contract of resale made by a vendee, confiding in the vendor's promise to deliver the article, are considerations always excluded as too remote and contingent to affect the question of damages. * * *

"When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into the account in ascertaining the true measure of damages, they usually have reference to dependent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may and doubtless often does exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtile to be reached by legal proof or judicial investigation. And besides, the consequences, when injurious, are as often perhaps attributable to the indiscretion and fault of the party himself, as to the conduct of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs were

embarrassed, than if it had been made with one in prosperous or affluent circumstances. * * *

"But profits or advantages which are the direct or immediate fruits of the contract entered into between the parties, stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed perhaps the only inducement to the arrangement. The parties may indeed have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must therefore abide the hazard.

"Such being the relative position of the contracting parties, it is difficult to comprehend why, in case one party has deprived the other of the gains or profits of the contract by refusing to perform it, this loss should not constitute a proper item in estimating the damages. To separate it from the general loss would seem to be doing violence to the intention and understanding of the parties, and severing the contract itself." [4]

The requiring of certainty excludes many profits from consideration. "Profits are not excluded from recovery, because they are profits; but when excluded, it is on the ground that there are no *criteria* by which to estimate the amount with the certainty on which the adjudications of courts, and the findings of juries should be based.[5] The

4—Masterton v. Mayor of Brooklyn, (1845) 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

5—This statement is too narrow. Lack of compliance with rules of causation is just as effective in barring a recovery as is lack of certainty.

amount is not susceptible of proof. In 3 Suth. Dam. 157, the author discriminatingly observes: 'When it is advisedly said that profits are uncertain and speculative, and cannot be recovered, when there is an alleged loss of them it is not meant that profits are not recoverable merely because they are such, nor because profits are necessarily speculative, contingent and too uncertain to be proved; but they are rejected when they are so; and it is probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and therefore it is more a general truth than a general principle, that a loss of profits is no ground on which damages can be given.' When not allowed because speculative, contingent, and uncertain, their exclusion is founded by some on the ground of remoteness, and by others, on the presumption that they are not in the legal contemplation of the parties."[6]

In allowing profits to a jeweler tortiously ejected from the store which he occupied, the Michigan court, emphasizing the fact that the allowance of profits in a tort case is less limited than in contract cases, the agreement and contemplation of the parties having no place in cases of tort, said in regard to certainty: "Since, from the nature of the case, the damages cannot be estimated with certainty, and there is a risk of giving by one course of trial less, and by the other more than a fair compensation,—to say nothing of justice,—does not sound policy require that the risk should be thrown upon the wrongdoer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation, than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sus-

6—Brigham v. Carlisle, (1884) 78 Ala. 243, 56 Am. Rep. 28.

tained from the injury, though the amount thus excluded cannot be estimated with accuracy by a fixed and certain rule. Certainty is doubtless very desirable in estimating damages in all cases; and where, from the nature and circumstances of the case, a rule can be discovered by which adequate compensation can be accurately measured, the rule should be applied in actions of tort as well as in those upon contract. Such is quite generally the case in trespass and trover for the taking or conversion of personal property, if the property (as it generally is) be such as can be readily obtained in the market and has a market value. But shall the injured in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal) because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. And, though a rule of certainty may be found which will measure a portion, and only a portion, of the damages, and exclude a very material portion, which it can be rendered morally certain the injured party has sustained, though its exact amount cannot be measured by a fixed rule; here to apply any such rule to the whole case, is to misapply it; and so far as it excludes all damages which cannot be measured by it perpetrates positive injustice under the pretense of administering justice.''[7]

Where the loss of profits in a business is an element of damage in a personal injury case, the fact that plaintiff has kept no itemized accounts of the costs and receipts of the business, does not render the amount of such loss so uncertain as to be necessarily not recoverable. If there are no accounts, the plaintiff's estimate of profits is ad-

7—Allison v. Chandler, (1863) 11 Mich. 542.

missible in evidence. The absence of accounts goes only to the weight of the evidence.[8]

It must be remembered that, on principle and according to the weight of authority, the plaintiff can recover for loss of profits, whether in contract or in tort, if he can meet the usual requirements of causation and certainty.[9] So, one employed for a definite period to represent another, with compensation to consist of commissions upon business done, has a right to recover for loss of such profits as must, with reasonable certainty, have accrued to him but for the wrongful termination of the contract by the other party.[10] An agent employed for a definite period to write insurance has a right, upon wrongful termination of the contract by the insurance company, to show the amount of probable renewals on existing policies, on which he should receive commissions and also to show the amount of commissions on such policies as plaintiff would probably have written during the remaining portion of the period of employment, as indicated by the amount of business actually done by the agent succeeding him, the amount of business done by himself previously to dismissal, and the number and character of "prospects."[11]

In contract, the fact that prospective profits are hard to compute or necessarily rather speculative, does not bar them, if the parties contemplated them.[12]

8—Comstock v. Connecticut Ry. etc., Co., (1904) 77 Conn. 65, 58 Atl. 465.

9—Wells v. National Life Ass'n, (1900) 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 33; Dennis v. Maxfield, (1865) 10 Allen (Mass.) 138; Emerson v. Pacific Coast, etc., Packing Co., (1905) 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 6 Ann. Cas. 973, 113 Am. St. Rep. 603; Schumaker v. Heinemann, (1898) 99 Wis. 251, 74 N. W. 785.

10—McGinnis v. Studebaker Corporation, (1915) 75 Ore. 519, 146 Pac. 825, 147 Pac. 525, Ann. Cas. 1917 B 1190.

11—Wells v. National Life Ass'n, (1900) 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A. 33.

12—Dennis v. Maxfield, (1865) 10 Allen (Mass.) 138.

76. **Bargains.**—Closely related to and somewhat intermingled with profits are bargains lost by reason of defendant's breach of contract. Often an important,—sometimes the sole,—element of damage in a contract case is the loss of a bargain. If the plaintiff has a contract under which the defendant is to supply him an article at a stated price, which is less than the market price at the time and place of delivery, and defendant breaks the contract, the plaintiff has a right to be compensated for the bargain,—the financial advantage,—which he has lost. So it is in any case of breach of contract in which the plaintiff has suffered the loss of a bargain contemplated by the parties.[13]

CASE ILLUSTRATIONS

1. Defendant agreed to constitute plaintiffs its sole agents for the sale of at least 85 per cent of its entire pack of fish of all kinds, for two years. At the end of one year, defendant repudiated the contract. Held, that profits might be recovered. "Profits were necessarily within the actual contemplation of the parties. They are, therefore, proper basis for award of damages. * * * Deep sea fishing is not more speculative than mining, for breach of contract with respect to which future profits have been allowed as damages. * * * Nor is there any uncertainty as to the existence, but only as to the extent, of the profits." [14]

2. A manufacturer failed to fill orders for a wholesaler according to contract. Held, that the wholesaler cannot recover for loss of profits on sales which plaintiff might have made if the contract had been fulfilled, in the absence of notice to the manufacturer unless such loss was in the contemplation of the parties as a probable result of a breach of contract.[15]

13—Dustan v. McAndrew, (1870) 44 N. Y. 72.

14—Emerson v. Pacific Coast & Norway Packing Co., (1905) 96 Minn. 1, 104 N. W. 573, 1 L. R. A. (N. S.) 445, 6 Ann. Cas. 973, 113 Am. St. Rep. 603.

15—Holloway v. White-Dunham Shoe Co., (1906) 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704.

CHAPTER XX

Physical Pain

77. **Pain a Non-Pecuniary Element of Damage—Damages to Be Reasonable.**—In actions for personal injuries, a very common element of damage, for which, if it be a proximate result of defendant's wrong, compensation is always allowed, is physical pain.[1] Pain and suffering cannot be exactly measured in terms of money, and the only rule governing the allowance of damages for such an element, is that it must be reasonable. "This should not be estimated according to a sentimental or fanciful standard, but in a reasonable manner, as it is wholly additional to a pecuniary compensation afforded by the first and third items (expenditures for cure and loss of earning power) that enter into the amount of the verdict in such cases. * * * Some allowance has been held to be proper; but, in answer to the question, 'How much?' the only reply yet made is that it shall be reasonable in amount."[2] Probably nowhere is the restriction of a principle of reasonableness more needed than in this instance, and probably nowhere are the bounds of reasonableness more indistinct and unsatisfactory; and this is necessarily so, from the immeasurable nature of physical pain. The question of price as a compensation for plaintiff's suffering has no place in these cases; and "to suggest the idea of price to be paid to a volunteer as an

1—Peoria Bridge Ass'n v. Loomis, (1858) 20 Ill. 235, 71 Am. Dec. 263; Lake Shore & M. S. Ry. Co. v. Frantz, (1889) 127 Pa. 297, 18 Atl. 22, 4 L. R. A. 389; Goodhart v. Pennsylvania R. Co., (1896) 177 Pa. 1, 35 Atl. 191, 55 Am. St. 705.

2—Goodhart v. Pennsylvania R. Co., supra.

approximation to the money value of suffering, is to give loose rein to sympathy and caprice.'' [3]

CASE ILLUSTRATIONS

1. Plaintiff was negligently struck and seriously injured by defendant's car. Pain, physical and mental, is an element of damage.[4]

2. A railway company negligently put an employee to work at repairs between two cars, without the proper signal to indicate that he was there. Another car was driven against the car standing next to the one on which the employee was at work, greatly injuring the employee's hand. Recovery can be had for pain.[5]

3—Baker v. Pennsylvania R. Co., (1891) 142 Pa. 503, 21 Atl. 979, 12 L. R. A. 698.

4—Central Ry. Co. v. Serfass, (1894) 153 Ill. 379, 39 N. E. 119.

5—Richmond & D. Ry. Co. v. Norment, (1887) 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

CHAPTER XXI

Mental Suffering

78. **In General.**—Damages for mental suffering may properly be allowed in many cases. There are sometimes so many questions involved in the decision whether to make any allowance in damages for such suffering, that the determination of the matter is very complex.

79. **Mental Suffering as an Element of Damage in Contract.**—The common law is held not to include mental suffering as an element of damage in cases of breach of contract, unless such suffering is a natural and probable result of a breach of the contract—such a result as might well have been anticipated by the parties, and, at the same time, a proximate result.[1] This is no more than an application of the general rule as to the assessment of any damages in contract. There are comparatively few contract cases in which, under such a rule, damages for mental suffering can be allowed. The mere disappointment occasioned by the breach of an ordinary business contract cannot be allowed as an element of damage.

1—Birmingham Waterworks Co. v. Vinter, (1910) 164 Ala. 490, 51 So. 356. But see Lewis v. Holmes, (1903) 109 La. 1030, 34 So. 66, 61 L. R. A. 274, where damages for mental suffering were allowed for breach of contract to make plaintiff's wedding trousseau. This case, however, was decided under the Louisiana Civil Code, and so is of no authority on the common law. Such damages were allowed in Browning v. Fies, (1912) 4 Ala. App. 580, 58 So. 931, for breach of a liveryman's contract in connection with a wedding. See also Taxicab Co. v. Grant, (Ala. App. 1911) 57 So. 141; and Central of Georgia Ry. Co. v. Knight, (1911) 3 Ala. App. 436, 57 So. 253. In Aaron v. Ward, (1911) 203 N. Y. 351, 96 N. E. 736, mental suffering was compensated for in a case of breach of contract by revocation of a bathhouse ticket.

"Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule, that generally in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but no damages for the disappointment of mind occasioned by the breach of contract."[2] The breach of some contracts, however, may give rise to a right to damages for mental suffering; such as, a promise to marry,[3] a contract to transmit and deliver a telegram announcing death[4] (some cases *contra*[5]) or sickness, a carrier's contract to transport a corpse,[6] and a contract to keep a corpse safe or to prepare it for burial.[7] Contrary to the usual rule, it has been held in Texas that damages for mental suffering may be given for breach of an ordinary

2—Pollock, C. B., in Hamlin v. The Great Northern Ry. Co., (1856) 1 Hurl. & N. 408, 156 Eng. Repr. 1261.

3—Berry v. Da Costa, (1866) L. R. 1 C. P. 331, citing Smith v. Woodfine, (1857) 1 C. B. (N. S.) 660, which cites Sedgwick on Damages (2d ed.) p. 368. Sedgwick cites Wells v. Padgett, (1850) 8 Barb. (N. Y.) 323, and other cases.

4—Western Union Tel. Co. v. Hill, (1909) 163 Ala. 18, 50 So. 248; Mentzer v. Western Union Tel. Co., (1895) 93 Ia. 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294; Stuart v. Western Union Tel. Co., (1885-6) 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623.

5—Connell v. Western Union Tel. Co., (1893) 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575. Recent cases hold that, as to interstate telegrams, the federal rule applies under recent federal statutes, so that damages for mental suffering are not recoverable. Western U. Tel. Co. v. Hawkins, (Ala. 1917) 73 So. 973; Western U. Tel. Co. v. Showers, (Miss. 1916) 73 So. 276.

6—Louisville & N. R. Co. v. Hull, (1902) 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 771; Hale v. Bonner, (1891) 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850.

7—Compensation for mental suffering was allowed in a case where defendant, an undertaker, had broken his contract to deliver a certain coffin and robe, by delivering only a box, and that too small, jamming the corpse into it, and furnishing no robe. J. E. Dunn & Co. v. Smith, (Tex. Civ. App. 1903) 74 S. W. 576. For such allowance for breach of contract to keep corpse safely, see Renihan v. Wright, (1890) 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 249. In Lindh v.

contract of a passenger carrier;[8] but it has been more recently held, by the Texas Court of Civil Appeals, that such damages are recoverable only if the probability of such suffering was made known to the railroad company at the time of the making of the contract.[9] Usually, unless a breach of a carrier's contract has resulted in a personal physical injury to the plaintiff, there can be no recovery thereon for mental suffering.[10]

It is to be noticed that every one of these contracts for the breach of which mental suffering is commonly allowed as an element of damage, is one of which the breach may well have been expected to bring such suffering as a result. In such cases, mental suffering is a probable result of a breach,—indeed, in such cases as those involving death messages and corpses, the only really damaging result to be expected; and the parties to the contract, as reasonably prudent persons, may be said to have

Great Northern Ry. Co., (1906) 99 Minn. 408, 109 N. W. 823, 7 L. R. A. (N. S.) 1018, defendant company had negligently and wilfully permitted casket and corpse of deceased wife of plaintiff to remain in the rain, by which the casket was soiled and ruined and the corpse mutilated and disfigured. Recovery for mental suffering was allowed. This case follows Larson v. Chase, (1891) 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, in which the opinion is well reasoned but is rendered, however, in a case purely in tort. But see Hall v. Jackson, (1913) 24 Colo. App. 225, 134 Pac. 151, refusing to allow damages for mental suffering, where defendant, an undertaker, had so negligently prepared the body of plaintiff's husband for shipment, that it reached its destination much decomposed. The court grounded its decision upon the facts that defendant was not in a public calling and that his wrong was not wanton or wilful.

8—St. Louis, A. & T. Ry. Co. v. Berry, (1890) 4 Wills. Civ. C. (Tex.) 166, 15 S. W. 48, holds that damages for mental suffering are recoverable for breach of contract to carry passengers and baggage.

9—Jones v. Texas, etc., R. Co., (1900) 23 Tex. Civ. App. 65, 55 S. W. 371.

10—Hamlin v. The Great Northern Ry. Co., (1856) 1 H. & N. 408, 156 Eng. Repr. 1261; Wilcox v. Richmond & D. R. Co., (1892) 52 Fed. 264, 3 C. C. A. 73, 8 U. S. App. 118, 17 L. R. A. 804; Trigg v. St. Louis, etc., R. Co., (1881) 74 Mo. 147, 41 Am. Rep. 305; Walsh v. Chicago, etc., Ry. Co., (1877) 42 Wis. 23.

had such consequences in contemplation at the time of making the contract. Since, in such cases, no important element of damage except mental suffering can be said to have been contemplated, the aggrieved party would be without any effective remedy if this were not allowed as an element of damage. Where damages for mental suffering have been allowed for breach of contract, the tortious element of the breach has sometimes been assigned as a reason for such allowance;[11] and this may be correct on principle in the case of a carrier's contract or a breach of contract to marry; but it is unnecessary to rely upon this reason, for, in all the contract cases in which mental suffering has been compensated for as an element of damage, such suffering was merely a natural and probable result of the breach, within the contemplation of the parties at the time the contract was made, and therefore allowable as an element of damage in accordance with the general rules of the law of contracts. Absence of wantonness and wilfulness, or the absence of malice, has also been relied upon as a reason for not giving damages for mental suffering upon breach of contract.[12] On principle, it would seem that the tortious or non-tortious nature of the breach should not be the guiding star, but rather that the controlling element should be the fact that the parties should or should not have contemplated mental suffering as a probable consequence of a breach. Some courts have very properly held that, if mental suffering was such a result of the breach as should have been contemplated by the parties at the time of the making of the contract, and is, in the particular case, a proximate result of the breach, it must be compensated for,

11—Wright v. Beardsley, (1907) 46 Wash. 16, 89 Pac. 172. In a dictum, the opinion in Smith v. Sanborn State Bank, (1910) 147 Ia. 640, 126 N. W. 779, calls attention to the tortiousness of all breaches of contract for which damages for mental suffering have been allowed.

12—Hall v. Jackson, (1913) 24 Colo. App. 225, 134 Pac. 151.

refraining from any discussion of malice or tortiousness.[13]

Clearly, there is no rule that damages for mental suffering are never to be allowed in a contract action; but the cases in which such damage is shown to be the probable, natural, and proximate result of the breach, are comparatively rare.[14]

80. **Mental Suffering as an Element of Damage in Tort.** —In many tort cases, mental suffering is a proper element of damage. Where a tort merely against property has been committed, it is not usually a recoverable element; but, in the case of a negligent tort causing injury to plaintiff's person, or of a wilful tort to the person, the plaintiff may recover for mental suffering.

81. **Actions for Torts Purely to Property** are commonly like those on ordinary business contracts, in that no damages for mental suffering are assessed, the usual reason given being that such suffering is not a natural consequence of injury to property.[15] But, when such tortious injury to property is accompanied by wilful misconduct, such as insolence, a larger recovery is sometimes allowed, even independently of the principle of exemplary

13—Adams v. Brosius, (1914) 69 Ore. 513, 139 Pac. 729, does not allow damages for mental suffering for breach of contract of physician to attend plaintiff's wife, saying that such suffering is not a proximate or natural result, and that damages for such suffering are too speculative. So also in Hyatt v. Adams, (1867) 16 Mich. 180, a tort action for malpractice resulting in the death of plaintiff's wife.

Contra: Western Union Tel. Co. v. Henderson, (1890) 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148, where plaintiff's wife had no physician in attendance, by reason of nondelivery of telegram by defendant.

14—Browning v. Fies, (Ala. App. 1912) 58 So. 931.

15—White v. Dresser, (1883) 135 Mass. 150, 46 Am. Rep. 454.

In Wyman v. Leavitt, (1880) 71 Me. 227, 36 Am. Rep. 303, an action for injury to real estate, it was held that the mental anxiety of the plaintiffs as to their own safety and that of their children, was not a recoverable element of damage.

damages. As Bramwell, B. says in Emblen v. Myers,[16] "Suppose a person caused a nuisance in front of another man's house, damages might be given for the insult as well as the actual injury." Sometimes mental suffering is a natural, probable, and proximate result of a trespass to property, and so is considered a proper element of damage, as in an action for breaking the plaintiff's close and carrying away the corpse of the plaintiff's child. Such a case was Meagher v. Driscoll,[17] in which the court said: "The gist of the action is the breaking and entering of the plaintiff's close. But the circumstances which accompany and give character to a trespass may always be shown either in aggravation or mitigation. * * * He who is guilty of a wilful trespass, or one characterized by gross carelessness and want of ordinary attention to the rights of another, is bound to make full compensation. Under such circumstances, the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort. Acts of gross carelessness, as well as those of wilful mischief, often inflict a serious wound upon the feelings, when the injury done to property is comparatively trifling. We know of no rule of law which requires the mental suffering of the plaintiff, or the misconduct of the defendant, to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by wantonness."

82. **Torts to the Person.**—Mental suffering is allowed as an element of damage, where plaintiff has suffered a physical injury as a result of defendant's tort to his person.[18] "In trespass for assault and battery, the jury may consider not only the mental suffering which accompanies

16—6 H. & N. 54, 158 Eng. Repr. 23.

17—(1868) 99 Mass. 281.

18—Dictum in Wyman v. Leavitt, (1880) 71 Me. 227, 36 Am. Rep. 303; citing Prentiss v. Shaw, (1869)

and is part of the bodily pain, but that other mental condition of the injured person which arises from the insult of the defendant's blows. Or for an assault alone, when maliciously done, though no actual personal injury be inflicted."[19] *A fortiori,* damages for mental suffering are allowed where slight physical damage to plaintiff's person has resulted from defendant's wrong.

83. **Where There Is no Physical Injury.**—Damages for mental suffering are sometimes assessed in cases of wilful tort, where there is no direct physical injury, and are refused in cases of negligence without physical injury. The wilfulness or lack of wilfulness of the defendant's act is sometimes expressly made the differentiating element.[20] As is said in Kline v. Kline,[21] "While the current of authority supports the doctrine that there can be no recovery for mental suffering, where there has been no physical injury, in ordinary actions for negligence, yet that is not the law as applied to a willful injury committed against the complaining party." Probably the really essential difference between the willful tort and the negligent tort is not the wilfulness itself, but is rather the fact that the wilful tort, such as an assault,

56 Me. 427, 96 Am. Dec. 475; and Wadsworth v. Treat, (1857) 43 Me. 163.

"Mental suffering cannot be dissociated from physical pain. Where the latter is found, the former is implied."—Montgomery & E. Ry. Co. v. Mallette, (1891) 92 Ala. 209, 9 So. 363.

19—Citing Goddard v. Grand Trunk Ry., (1869) 57 Me. 202, 2 Am. Rep. 39; and Beach v. Hancock, (1853) 27 N. H. 223, 59 Am. Dec. 373.

One of the best cases on the allowance of damages for mental suffering where there is no direct physical injury, is Kline v. Kline, (1902) 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397, in which the court says: "Having reached the conclusion that an actionable wrong was done appellee by appellant's willful act, we assert that, as the law imports some damage, she was entitled to recover full compensation, which includes compensation for her mental suffering, even if there was no unlawful touching of the body and no physical injury."

20—Jansen v. Minneapolis, etc., Ry. Co., (1910) 112 Minn. 496, 128 N. W. 826.

21—(1902) 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397.

is actionable *per se,* independently of damage to plaintiff, while negligence is not actionable *per se,* but is actionable only when damage has resulted to plaintiff. Mental suffering is not an independent cause of action; an actionable wrong, to which mental suffering is attached, must be established before such suffering can be compensated for.[22] Mental suffering may be allowed as an element of damage when a proximate result either of a wilful tort[23] or of actionable negligence causing injury to the person.[24] But the negligence must be actionable, or there can be no compensation for mental suffering.[25]

As a great deal of unnecessary confusion beclouds this subject, it seems best to digress sufficiently to determine what constitutes actionable negligence. "In every case involving actionable negligence, there are necessarily three elements essential to its existence: (1) The existence of a duty on the part of the defendent to protect the plaintiff from the injury of which he complains; (2) a failure by the defendent to perform that duty; and (3) an injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence

22—Reed v. Maley, (1903) 115 Ky. 816, 74 S. W. 1079, 62 L. R. A. 900, in which defendant, without committing an assault or other trespass, solicited plaintiff, a married woman, to have sexual intercourse. Plaintiff, proving no tort or breach of contract, showed no cause of action whatever, and so, of course, could not recover for mental suffering. The opinion distinguishes Newell v. Whitcher, (1880) 53 Vt. 589, 38 Am. Rep. 703.

23—Larson v. Chase, (1891) 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, criticizing the usual misinterpretation of Lynch v. Knight, (1861) 9 H. L. Cas. 577, 11 Eng. Repr. 854; Johnson v. Hahn, (1914) 168 Ia. 147, 150 N. W. 6; Lonergan v. Small, (1909) 81 Kan. 48, 105 Pac. 27, 25 L. R. A. (N. S.) 976; Phillips v. Hoyle, (1855) 4 Gray (Mass.) 568; Stowe v. Heywood, (1863) 7 Allen (Mass.) 118.

24—McDermott v. Severe, (1905) 202 U. S. 600, 26 Sup. Ct. 709, 50 L. ed. 1162.

25—"Of course, negligence without injury gives no right of action." Purcell v. St. Paul City Ry. Co., (1892) 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

of any one of these elements renders a complaint bad, or the evidence insufficient.'' [26]

84. **Mental Suffering Not Arising from Physical Injury or Pain.**—Mental suffering caused by the defendant's negligence, but not arising from physical injury or pain, is not usually regarded as giving a right of action.[27] This is often put upon the ground that such mental suffering is too remote.[28] As a matter of fact, it is not always too remote, as mental suffering may be and sometimes is a proximate result of defendant's negligence, even where there is no physical injury. The difficulty of ascertaining whether the mental suffering was caused by the negligent act, is also urged as a reason for denying relief.[29] The mere fact, however, that the plaintiff's case as to mental suffering depends largely upon his own testimony or upon unsatisfactory evidence, should not be deemed utterly to destroy his right to recover for such suffering, but rather merely to weaken his case as to matters of proof. Strict adherence to the rule bars many just, as well as unjust, claims. In their fear of the possible effect of a different holding in encouraging a flood of dishonest litigation based upon fictitious claims, some of the courts have deprived many persons of the right to enforce honest claims for actual injuries. The pernicious extension of the same doctrine even to cases wherein physical injury has been caused by the mental suffering, will be discussed elsewhere. As before stated, mental suffering is not an independent cause of action, and so an actionable wrong must first be established, before compensation can be had for mental suffering.

But, where a wilful tort causes mental suffering with-

26—Faris v. Hoberg, (1893) 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261.

27—Victorian Rys. Commissioners v. Coultas, (House of Lords, 1888) L. R. 13 App. Cas. 222; not followed in Pugh v. London, etc., Ry. Co., 1896 2 Q. B. 248, which, however, was a slightly different case, arising on an accident insurance policy.

28—Victorian Rys. Commissioners v. Coultas, supra.

29—Id.

out any direct physical injury, there is a cause of action.[30] In cases of abduction, seduction, libel, slander, assault, and other wilful torts, mental suffering is allowed for, although the plaintiff has suffered no personal physical injury.[31] This is because, in such cases, the defendant's wrongful act is actionable *per se*, being in this respect different from mere negligence.

85. **Physical Injuries Resulting from Mental Suffering.**—Fright, fear, or worry, caused by the defendant's wrong, often, in turn, produces serious bodily harm. Indeed a nervous shock is itself sometimes very correctly said to be a physical rather than a mental injury, even when a mental disturbance accompanies it. Probably most of such cases, in which the plaintiff's person has not come into contact with any physical agency of the defendant, are cases involving that species of mental suffering known as fright. Where fright, proximately caused by a wrongful act, either wilful or merely negligent, causes physical injury, such as nervous prostration, general impairment of health, or a miscarriage, such physical injury is, by some courts, and according to the better view, deemed a proximate result of the wrongful act, and so is a recoverable element of damage.[32] The weight of case

30—Watson v. Dilts, (1902) 116 Ia. 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239; Schmitz v. St. Louis, etc., R. Co., (1893) 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Lipman v. Atlantic, etc., R. Co., (S. Car. 1917) 93 S. E. 714, 85 Cent. Law Jour. 339.

31—Stowe v. Heywood, (1863) 7 Allen (Mass.) 118.

32—Watson v. Dilts, (1902) 116 Ia. 249, 89 N. W. 1068, 57 L. R. A. 559, 93 Am. St. Rep. 239; Purcell v. St. Paul City Ry. Co., (1892) 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Hill v. Kimball, (1890) 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; Spade v. Lynn & Boston R. Co., (1897) 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393, differentiates between cases of mere ordinary negligence and those of gross recklessness or wilful misconduct, allowing no recovery for mere fright or mental distress caused by ordinary negligence, but impliedly admitting that such recovery is allowed where there is a wilful or grossly negligent wrong.

"In the light of modern science,

authority, however, is that such physical injury is too remote a consequence to constitute a cause of action, if the wrongful act was merely negligent.[33] Here, as in actions brought for mental suffering alone, anticipation of the probable effect of favorable holdings in increasing the litigation of wrongful claims, has tended to make the courts very reluctant to recognize the plaintiff's rights.[34]

Where a wrongful act, actionable *per se*, is wilful, there is almost universally an allowance of damages for

—nay, in the light of common knowledge,—can a court say, as a matter of law, that a strong mental emotion may not produce in the subject bodily or mental injury? May not epilepsy or other nervous disorder or insanity result from fright? May not a miscarriage result from a mental shock?'' —Gulf, Colorado, etc., Ry. Co. v. Hayter, (1900) 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856.

See note, ''Right to Recover Damages for Bodily Pain and Suffering Resulting from Fright without Actual Physical Violence,'' 12 Ann. Cas. 741.

33—Victorian Rys. Commissioners v. Coultas, (House of Lords, 1888) L. R. 13 App. Cas. 222. Mitchell v. Rochester Ry. Co., (1896) 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604, goes so far as to hold that there can be no recovery for a miscarriage from fright caused by defendant's negligence. In Ireland, there has been a refusal to follow the rule laid down in the Coultas Case. Bell v. Great Northern Ry. Co., (1890) 26 L. R. Ire. 428; in which decision attention is called to an unreported case decided in 1882-4, allowing recovery for nervous shock without more direct physical injury. This is of especial interest, as the Coultas Case is put partly on the ground of the novelty of the action.

In accord with the Bell Case are: Sloane v. Southern California Ry. Co., (1896) 111 Calif. 668, 44 Pac. 320, 32 L. R. A. 193; Purcell v. St. Paul City Ry. Co., (1892) 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; and many other American cases.

34—Wilkinson v. Downton, L. R. 1897 Q. B. 57. ''While almost all the authorities agree that recovery may be had for physical injury resulting from fright caused by a wilful, wrongful act, the courts are hopelessly divided in opinion * * * as to whether or not recovery should be permitted where the act causing the fright is a negligent one merely, and not a wilful one. Not only are they disagreed as to whether a recovery should be allowed for a physical injury resulting from fright caused by a wrongful act, but, where they deny recovery, they disagree as to the reason for denying it; and very often a court will state two or three reasons which are inconsistent.'' Note in 22 L. R. A. (N. S.) 1073. See also note in 3 L. R. A. (N. S.) 49.

physical injury consequent upon fright or nervous shock proximately caused by such wrongful act.[35]

86. **The "Impact Theory."**—A number of negligence cases, approving the rule laid down in Victorian Railway Commissioners v. Coultas,[36] have gone still farther and laid down a rule that, in order to have a recovery for fright or other mental suffering or the results thereof, the plaintiff must prove that he was injured by physical impact.[37] As a matter of fact, the court, in the Coultas Case, expressly refrains from finding that impact is essential to a recovery. The rule making impact essential is not based upon sound reason and is often criticized. Although negligence plus fright or other mental suffering alone may give no right of recovery, damages should be assessed for negligence plus resulting fright plus physical injury resulting from the fright, even where there is no impact, if, on the facts of the case, the physical injury is a proximate result of defendant's negligence.[38] The mere intervention of fright or other mental disturbance should not be held so to break the chain of causal connection between defendant's negligence and plaintiff's physical injury as to make such physical injury too remote.

87. **Mental Suffering Caused by Injury to Third Party.**—No right of action accrues to one because of one's distress of mind at an injury to another. A kind of causal connection may exist between the wrong and such

35—L. R. A. notes, supra.

36—(House of Lords, 1888) L. R. 13 App. Cas. 222.

37—Spade v. Lynn & Boston R. Co., (1897) 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393. The "'impact theory" is substantially followed in Braun v. Craven, (1898) 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, a very poorly reasoned case. See also Mitchell v. Rochester Ry. Co., (1896) 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604.

38—Sloane v. Southern California Ry. Co., (1896) 111 Calif. 668, 44 Pac. 320, 32 L. R. A. 193; O'Meara v. Russell, (Wash. 1916) 156 Pac. 550.

mental suffering, but the result is too remote.[39] So, mental suffering at the libel of a dead relative is not a cause of action.[40] The allowance of damages for mental suffering of a parent in an action for seduction, is sometimes pointed to as an exception to the general rule;[41] but it is more an exception in appearance than in reality, for the action is for a wrong done to the parent's rights in his child. In such a case, although the physical injury takes effect only upon the body of the seduced, there is an invasion and disturbance of plaintiff's family relations.

CASE ILLUSTRATIONS

1. Defendant railroad company broke its contract to transport plaintiff to the bedside of his sick father. By defendant's delay, plaintiff was compelled to wait for a long time and to suffer much anxiety. He cannot recover for mental suffering. This is a mere breach of contract, without physical suffering or pecuniary loss.[42]

2. Defendant broke his promise to marry plaintiff. Plaintiff may recover for "whatever mortification or distress of mind she suffered, resulting from the refusal of the defendant to fulfill his promise."[43]

3. The defendant wrongfully removed the remains of the plaintiff's child from a burying-place. Injury to the feelings of the plaintiff constitutes a proper element of damage.[44]

39—Covington St. R. Co. v. Packer, (1873) 9 Bush (Ky.) 455, 15 Am. Rep., 725; Sperier v. Ott, (1906) 116 La. 1087, 41 So. 323, 7 L. R. A. (N. S.) 518, 114 Am. St. Rep. 587; Gulf, C. & S. F. Ry. Co. v. Overton, (1908) 101 Tex. 583, 110 S. W. 736, 19 L. R. A. (N. S.) 500.

40—Bradt v. New Nonpareil Co., (1899) 108 Ia. 449, 79 N. W. 122, 45 L. R. A. 681.

41—Covington St. Ry. Co. v. Packer, (1873) 9 Bush. (Ky.) 455, 15 Am. Rep. 725.

42—Wilcox v. Richmond, etc., R. Co., (1892) 52 Fed. 264, 3 C. C. A. 73, 8 U. S. App. 118, 17 L. R. A. 804.

43—Coolidge v. Neat, (1880) 129 Mass. 146.

44—Bessemer Land, etc., Co. v. Jenkins, (1895) 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; following Meagher v. Driscoll, (1868) 99 Mass. 281, 96 Am. Dec. 759.

4. The plaintiff, a passenger on the defendant's boat, was compelled by the defendant to leave the boat because he had not had his ticket validated according to its terms. The plaintiff cannot recover for fear and trepidation caused by the fact that the defendant failed to furnish him safe means of getting off the boat.[45]

5. Defendant's wrongful act caused damage to plaintiff's property, but not physical injury to the plaintiff. There can be no recovery here for mental suffering.[46]

6. The plaintiff, a young woman of good character, was, by mistake, wrongfully ordered off the grounds of the defendant company, before a large number of people, by an employee of the defendant, who thought she was a lewd woman. She can recover for mental suffering, although she suffered no direct physical injury.[47]

7. The defendant wrongfully destroyed the furnace in the house occupied by the plaintiff, whose child was ill. It did not appear that the child was injured by the defendant's act, but "the plaintiff was annoyed, and subjected to more or less mental suffering and anxiety, by reason thereof." Held, that such mental suffering and anxiety could be considered in estimating damages.[48]

8. The defendant railroad company shoved its cars off the end of a switch track and into the dwelling of the plaintiff, who, being in the house at the time, "suffered a severe nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish and permanent injury to her person and health." There was no claim that the plaintiff, at the time of the accident, received any actual bodily injury, or that the defendant's negligence was willful or wanton. Here there can be no recovery for injuries resulting from fright or nervous shock. Such injuries are said by the court not to be the natural and probable consequences of the negligence com-

45—Southern Pacific Co. v. Ammons, (Tex. Civ. App. 1894) 26 S. W. 135.

46—Gulf, etc., Ry. Co. v. Trott, (1894) 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866.

47—Davis v. Tacoma Ry., etc., Co., (1904) 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802.

48—Vogel v. McAuliffe, (1895) 18 R. I. 791, 31 Atl. 1.

plained of. The decision is based partly upon the ground of public policy.[49]

9. The defendant, by negligent blasting, caused a rock to crash through the plaintiff's residence, frightening the female plaintiff, greatly shocking her nervous system, and almost causing a miscarriage. Held, that there can be a recovery for nervous shock. "The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and, when 'out of tune,' cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether wilful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs."[50]

10. The defendant came to the home of the plaintiff and her husband, and, within hearing, but out of sight of the plaintiff, who was in bed, quarreled with the plaintiff's husband, calling him offensive names, using vile language, drawing a knife, and threatening to cut him. The plaintiff was pregnant at the time and became so frightened that she had a miscarriage. Held, that there could be no recovery for the plaintiff's fright and consequent miscarriage. "The injury in question not being one which the defendant could reasonably be expected to anticipate as likely to ensue from his conduct, we can not regard it as the natural consequence thereof, for which defendant is legally liable."[51]

11. Defendant, in the absence of plaintiff's husband, and with the purpose of collecting a claim against the husband, wrongfully entered the home of plaintiff, who was far advanced in pregnancy. Defendant made threats, causing plaintiff to be-

49—Miller v. Baltimore & O. S. W. R. Co., (1908) 78 O. St. 309, 85 N. E. 499, 18 L. R. A. (N. S.) 949, 125 Am. St. Rep. 699.

50—Kimberley v. Howland, (1906) 143 N. C. 398, 55 S. E. 778, 7 L. R. A. (N. S.) 545; a well reasoned case. The opinion seems to be based upon more satisfactory reasoning than does that in the preceding case.

51—Phillips v. Dickerson, (1877) 85 Ill. 11, 28 Am. Rep. 607. Scott, J. dissented. The result of the holding in the particular case seems unfortunate and unjust. The decision seems to be a result of too strict a construction of "proximate result."

come nervous, excited and ill, and to give premature birth to her child. Held, that defendant is liable.[52]

12. Defendant wrongfully entered the bed room of plaintiff, a blind girl, and leaned over her and solicited criminal sexual relations, which plaintiff refused. Plaintiff was so alarmed by defendant's acts, and her feelings were so outraged, that she suffered a long illness. Held, that she may recover damages.[53]

13. The defendant company conducted a school for instruction in the operation of automobiles. Defendant's employee negligently permitted an inexperienced student to drive an automobile, which, because of the student's lack of skill, collided with a buggy in which were the plaintiff and others, delivering so severe a shock to the plaintiff, "who was leaning against the back of the seat of the buggy, that she was knocked forward out of her seat." Plaintiff was then pregnant. "About a month thereafter she suffered a miscarriage. By the medical testimony the foetus had been dead about 2 or 3 weeks, and the miscarriage was the result of the fright and the shock caused by the collision," and evidence was also introduced, showing that the plaintiff had suffered a second miscarriage a few months after the first, and further medical testimony was given that the second miscarriage, in the opinion of the witness, was caused by the other injuries in question. The plaintiff could recover for fright either accompanying or following the original physical injury, and for the miscarriage or miscarriages resulting from the direct personal injury and fright.[54]

14. Defendant unlawfully placed a barbed wire fence across a highway. Plaintiff, with his wife and daughter, in a carriage, collided with it, and plaintiff was injured. Held, that plaintiff's mental anxiety for the safety of his wife and daughter cannot be considered as an element of damage.[55]

52—Engle v. Simmons, (1906) 148 Ala. 92, 41 So. 1023, 12 Ann. Cas. 740. Accord: Hill v. Kimball, (1890) 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618.

53—Newell v. Whitcher, (1880) 53 Vt. 589, 38 Am. Rep. 703.

54—Easton v. United Trade, etc., Co., (1916) 173 Cal. 199, 159 Pac. 597.

55—Keyes v. Minneapolis & St. L. Ry. Co., (1886) 36 Minn. 290, 30 N. W. 888.

CHAPTER XXII

Inconvenience

88. **Physical Inconvenience** is a proper element of damage whether the action be in contract [1] or in tort,[2] subject, of course, to the usual rules as to proximity and certainty. But when inconvenience produces nothing more than annoyance or "worriment," compensation is not allowed.[3] One judge, in deciding an important case,[4] seems to lay some stress upon the seriousness of the inconvenience, saying: "I think there is no authority that personal inconvenience, where it is sufficiently serious, should not be subject of damages to be recovered in an action of this kind." The question how serious inconvenience must be in order to constitute an element of damage, if seriousness forms the sole criterion, is manifestly very difficult. But it is obvious that not all degrees of inconvenience are of sufficient importance to claim the attention of a court, and probably no more satisfactory or practicable plan will ever be found than to make seriousness of the inconvenience the determining factor and to say that no inconvenience shall be compensated for unless it be of sufficient seriousness to war-

1—Hobbs v. London & S. W. Ry. Co., (1875) L. R. 10 Q. B. 111.

2—Baltimore & P. R. Co. v. Fifth Baptist Church, (1883) 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. 719; wherein physical inconvenience to plaintiff church was occasioned by smoke, noise, and odors from defendant's machine shop. See also Chicago & A. R. Co. v. Flagg, (1867) 43 Ill. 364, 92 Am. Dec. 133, a case of wrongful expulsion from defendant's train, resulting in physical inconvenience to plaintiff.

3—Turner v. Great Northern Ry. Co., (1896) 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883, quoting 1 Sedg. Dam. (8th ed.) § 42, as follows: "Damages will not be given for mere inconvenience and annoyance, such as are felt at every disappointment of one's expectations, if there is no actual physical or mental injury." On the facts in the case, the damages for "worriment" and disappointment resulting from the inconvenience caused, were too remote to be recovered.

4—Hobbs v. London & S. W. Ry. Co., (1875) L. R. 10 Q. B. 111.

rant the granting of compensation. The plaintiff has a right to recover for clearly physical inconvenience.[5] To hold that inconvenience, to be the basis of damages, must be not only physical, but also ascertainable by some pecuniary standard, is perhaps going rather far; but it has been so held.[6] It would seem that inconvenience could often be considerable, without being such as to affect the pecuniary means of the person wronged. It is very difficult to state a complete and unfailing general rule on the subject, but it is safe to say that the courts are not inclined to allow substantial damages for inconvenience, annoyance, or discomfort depending merely upon the taste or imagination of the plaintiff.[7]

CASE ILLUSTRATIONS

1. A railroad company negligently carries a passenger beyond his destination. Among the elements of damage is inconvenience.[8]

2. A telegraph company instituted condemnation proceedings against a railroad company, in order to secure the privilege of constructing a telegraph line along the railroad's right of way. "Any inconvenience or annoyance resulting from the construction of the telegraph line, which is of such a character as to interfere in any way with the operation of the railroad by reason of the construction of the telegraph line, may properly be considered by the jury in assessing damages; but the evidence must disclose the facts from which such inconveniences or annoyances result; no presumption of fact can be drawn that any special annoyance or inconvenience will result solely because of the construction of the telegraph line."[9]

5—Southern Kansas Ry. Co. v. Rice, (1888) 38 Kan. 398, 16 Pac. 817, 5 Am. St. Rep. 766.

6—Detroit Gas Co. v. Moreton Truck, etc., Co., (1897) 111 Mich. 401, 69 N. W. 659; Hunt ads. D'Orval, (1838) Dudley (S. Car.) 180.

7—Cleveland v. Citizens Gas Light Co., (1869) 20 N. J. Eq. 201; Westcott v. Middleton, (1887) 43 N. J. Eq. 478, 11 Atl. 490.

8—Simmons v. Seaboard Air-Line R. Co., (1904) 120 Ga. 225, 47 S. E. 570, 1 Ann. Cas. 777; Dalton v. Kansas City, F. S. & M. R. Co., (1908) 78 Kan. 232, 96 Pac. 475, 17 L. R. A. (N. S.) 1226.

9—Atlantic Coast Line R. Co. v. Postal Telegraph-Cable Co., (1904) 120 Ga. 268, 48 S. E. 15, 1 Ann. Cas. 734.

CHAPTER XXIII

Reputation

89. **Injury to Reputation** is usually a non-pecuniary element of damage; but, in some instances, it is a pecuniary element, as where the injury is to one's financial reputation.[1] Damage to reputation appears in several types of cases, notably in slander and libel.[2] It frequently figures also in cases of malicious prosecution.[3] A parent or husband, suing for the seduction of a daughter or wife, has a right to recover for the disgrace or dishonor inflicted upon him and his family.[4]

Injury to financial reputation is a prominent element of damage in actions for wrongfully dishonoring checks.[5]

In libel, it is usually held that "the defendant may introduce evidence, in mitigation of damages, that the plaintiff's general reputation, as a man of moral worth, is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question; and, as to the admission of such evidence, it is immaterial whether the defendant has simply pleaded the general issue, or has pleaded a justification as well as the general issue."[6] So also in

1—Lawrence v. Hagerman, (1870) 56 Ill. 68, 8 Am. Rep. 674.

2—Swift v. Dickerman, (1863) 31 Conn. 285; Sickra v. Small, (1895) 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

3—Lytton v. Baird, (1883) 95 Ind. 349.

4—Matheis v. Mazet, (1894) 164 Pa. 580, 30 Atl. 434.

5—J. M. James Co. v. Continental National Bank, (1900) 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255.

6—Sickra v. Small, supra. See also Duval v. Davey, (1877) 32 O. St. 604.

slander, the defendant's right to prove the bad reputation of the plaintiff in mitigation of damages, is very clear, on the same principle as in libel.[7] But a Connecticut case says: "No rule of law is better settled that that in actions of slander the defendant shall not be permitted to prove the truth of the words for the purpose of mitigating the damages. If the charge is true, that may be pleaded in justification, and must be so pleaded, or notice of justification must be given at the time of pleading, or it cannot be proved upon the trial."[8]

7—Georgia v. Bond, (1897) 114 Mich. 196, 72 N. W. 232.

8—Swift v. Dickerman, (1863) 31 Conn. 285.

CHAPTER XXIV

Loss of Services

90. **The Master's Right to Damages —Matters Considered in Computing.**—The relation of master and servant has been, from early times, recognized as an important one, entitling the master to the services of the servant and giving him a right to have damages assessed against any person committing such a wrong as deprives the master of the services of his servant. Likewise, the parent has a right to the services of his minor child, and he has a right, good against all except the child himself, to the services of a child who has come of legal age and continues to live in the parent's household. So has the husband a right to the services of his wife. Like the master, the father or the husband has a right to damages against any person wrongfully depriving him of such services. Loss of services, as an element of compensation, commonly figures in cases of personal injury or seduction of a child of the plaintiff. The pecuniary value of the services lost is the measure of damages for this element, but other elements of loss sometimes enter into the same case. In arriving at the amount to be awarded for loss of services, consideration must be given the character of the services, the fitness of the servant to give such services, the term for which the services would have been rendered but for the tort of the defendant, and the amount usually paid for such services.[1]

1—Further treatment of this subject is found in Chapter XLIX, "Seduction," and elsewhere in the treatment of particular wrongs.

CASE ILLUSTRATIONS

1. A entices away B, a servant of C. The latter may maintain an action on the case against A for the loss of B's services.[2]

2. Plaintiff brings action for seduction of his daughter. Loss of her services is an element of damage.[3]

2—Forbes v. Morse, (1896) 69 Vt. 220, 37 Atl. 295.

3—Cook v. Bartlett, (1901) 179 Mass. 576, 61 N. E. 266.

CHAPTER XXV

Expenses of Litigation

91. **Taxable Expenses of Litigation Limited to Court Costs.**—In the early days of the common law, no costs, as such, were awarded to either party; but costs were included in the *quantum* of damages.[1] Today, however, a judgment obtained at common law carries with it court costs, as such, consisting of taxable fees and, as a general rule, of nothing else.[2] There can be no recovery for the time, trouble and annoyance incident to the suit, nor for consequential losses accruing because of it.[3]

92. **Counsel Fees.**—At common law, the successful party usually has no right to have the fees of his attorney, as such taxed against his opponent.[4] The defendant may have won a case that has been vexatiously and senselessly concocted and protracted by the plaintiff; or the plaintiff may have been victorious in a case in which the defendant has very wrongfully put the plaintiff to the trouble of resorting to a court for a remedy. Yet, in neither case will the court ordinarily allow counsel fees to the successful party. Each party to the action must pay his own lawyer. A number of reasons are assigned for this rule, among which are: the difficulty in setting the amount of such fees, whether they be set by court or jury; the impossibility of stating accurately the amount of ex-

1—3 Blackstone 399.

2—Day v. Woodworth, (1851) 13 How. 363, 14 L. ed. 181. "Costs usually are but an incident of the litigation, and to be disposed of therein, and not generally recoverable as damages in another action."—Marvin v. Prentice, (1884) 94 N. Y. 295.

3—13 Cyc. 79.

4—Day v. Woodworth, supra.

penditure for counsel actually occasioned by the prosecution or defense of the action; and the impracticability of determining the good faith of the defendant or the plaintiff.

Counsel fees paid in prior actions have, however, often been allowed at common law; but it seems that, in every instance of the kind, the conduct of the party against whom they were allowed, so directly and certainly caused the expenditure for this purpose, that the loss of the amount so paid was easily within such causal relation to the defendant's wrong as to warrant the assessment of damages in compensation for it.[5] In an action for malicious prosecution, counsel fees paid in defense of the action wrongfully brought are clearly such a loss as must constitute a basis of compensation.

"When actions are brought to recover indemnity either where the right to indemnity is implied by law or arises under a contract, reasonable counsel fees which have been incurred in resisting the claim indemnified against may be recovered as a part of the damages and expenses. * * * So where the plaintiff, in consequence of the wrongful conduct of the defendant, has been put to expense in the employment of counsel, the amount so paid is an element of damage in an action against the defendant arising out of such wrongful conduct."[6]

Some malicious torts have sometimes been treated as exceptions to the general rule that no compensation for counsel fees will be allowed; but no satisfactory statement of the principles governing this branch of the subject has ever been evolved by any court.[7] In some jurisdictions, counsel fees may be recovered in cases in which

5—Levitzky v. Canning, (1867) 33 Calif. 299.

6—Sears v. Inhabitants of Nahant, (1913) 215 Mass. 234, 102 N. E. 491. See also Inhabitants of Westfield v. Mayo, (1877) 122 Mass. 100, 23 Am. Rep. 292.

7—See Cleveland, C. & C. R. Co. v. Bartram, (1860) 11 O. St. 457; and White v. Givens, (1877) 29 La. Ann. 571.

exemplary damages are given;[8] but such a rule seems to be founded more on sentiment than on principle.

Numerous and varied statutory and judicial regulations as to costs have been made in the several states.[9]

93. **No Damages Assessed to Cover Expenditures Made for Improvident Defense of Previous Action.**—Although it is well recognized that the plaintiff who, innocently relying upon his contract with the defendant, defends an action which is the natural and probable consequence of defendant's breach and which also proximately results therefrom, is entitled to recover of defendant the reasonable expenses of such defense, it does not follow that he is always entitled to recover such expenses merely because he has defended. A defense may have been the best apparent means of mitigating damages; but, on the other hand, defending the action may have been so clearly useless as to amount to a mere unnecessary increase of the plaintiff's loss. In such a case, the plaintiff's expenditures in the defense cannot be considered a recoverable element of damage. For instance, where A sells and warrants a horse to B as sound, and B, relying upon the warranty, re-sells him to C with a warranty of soundness, and C sues B on his warranty, and B defends the action, well knowing by this time that the horse does not comply with the warranty and that his defense will be in vain, B cannot, in an action against A on the warranty, recover his expense incurred in defending the action brought against him by C. Knowing that it was useless to defend, he was needlessly increasing his damage, and the loss of the amount of these expenses was a proximate result of his own improvidence, and not a proximate result of the defendant's breach of warranty.[10]

8—Yazoo & M. V. R. Co. v. Consumers' Ice, etc., Co., (1915) 109 Miss. 43, 67 So. 657.

9—E. g., see Carhart v. Wainman, (1902) 114 Ga. 632, 40 S. E. 781, 88 Am. St. Rep. 45.

10—Wrightup v. Chamberlain, (Common Pleas, 1839) 7 Scott 598.

CASE ILLUSTRATIONS

1. Defendants broke into plaintiff's rooms, and injured and destroyed his property. Counsel fees cannot be allowed plaintiff as either compensatory or exemplary damages.[11]

2. Defendants slandered plaintiff's title, as a result of which wrong plaintiff was obliged to make a large outlay in litigation for the purpose of getting a cloud removed from title. Held that, in an action for slander of title, the plaintiff may recover for his reasonable expenditures in the suit to remove the cloud.[12]

3. A lessor broke his covenant of quiet enjoyment by bringing two actions against his lessee to recover possession. The lessee may recover, in an action for breach of such covenant, counsel fees expended in the two actions wrongfully brought by the lessor.[13]

It is to be noticed that the case cited goes farther than the proposition stated in the text, placing upon the plaintiff a duty to ascertain whether it is prudent to make a defense.

11—Falk v. Waterman, (1874) 49 Calif. 224.

12—Chesebro v. Powers, (1889) 78 Mich. 472, 44 N. W. 290.

13—Levitzky v. Canning, (1867) 33 Calif. 299.

CHAPTER XXVI

Interest

94. **In General.**—The law as to interest as damages is so varied in different jurisdictions and has so many phases, that only a few of the most general principles can be stated here. The early common law did not favor the allowance of interest except where it was expressly stipulated for. With the growth of modern business usage, it has come to be so important and so usual to allow compensation for the use of money, that interest is now allowed in many instances in which no negotiable instrument or other express promise to pay interest is involved.

95. **On Liquidated and Unliquidated Sums.**—In some cases, it is very usual to allow interest as damages, as, for instance, where the defendant has failed to pay the plaintiff a certain agreed sum due at a certain time. In such a case, it is clear that the damage to the plaintiff is the value of the use of his money, which is the interest. On a demand for any sum stated or liquidated by agreement between the parties, interest at the legal rate from the time of default is allowed as damages.[1] Some courts, however, hold that, where a party fails to pay a negotiable instrument at maturity, the contract rate of interest continues after maturity;[2] but such a rule is not founded on principle, as the interest for the period after default

1—Holden v. Freedman's Savings, etc., Co., (1879) 100 U. S. 72, 25 L. ed. 567; McCreery v. Green, (1878) 38 Mich. 172.

2—Cecil v. Hicks, (1877) 29 Gratt. (Va.) 1.

is damages and is not based upon terms of the agreement at all.

As a general rule, interest is not allowed on unliquidated demands or damages.[3] The terms "liquidated" and "unliquidated" are not used with satisfactory uniformity in this connection.[4] There has been a tendency manifested in some courts to do what they believed to be justice, by compensating a plaintiff for a delay in the payment of what is not strictly a liquidated sum. Some courts have effected this result by stretching the meaning of "liquidated" practically into "easily ascertainable." Others have loosely allowed interest on account of the circumstances of the case. One court has boldly said that interest will be allowed where the evidence is so exact and definite as to the amount of damage and its elements that it requires only a simple computation by the jury to fix the amount.[5] "There is authority that goes to the extent of saying that the distinction between liquidated and unliquidated demands is practically obliterated, and that whenever a verdict liquidates a claim and fixes it as of a prior date, interest should be allowed on the claim from that date."[6] It is submitted that this

3—Cox v. McLaughlin, (1888) 76 Calif. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Pearson v. Ryan, (R. I. 1919) 105 Atl. 513.

4—"This term 'unliquidated damages' applies equally to cases of tort, as slander, assault and battery, etc., and to cases upon a quantum meruit, for goods sold and delivered, or services rendered. The reason for such a denial of interest is said to be that the person liable does not know what sum he owes, and therefore can be in no default for not paying."—Cox v. McLaughlin, supra.

5—Sullivan v. McMillan, (1896) 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239. "Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt, or as compensation for a breach of duty, or for the failure to keep a contract, interest attaches as an incident."—State v. Lott, (1881) 69 Ala. 147. It will be noticed that this is a very broadly stated rule; but, even as stated, it seems just and sound. In so far as it allows interest on entirely unliquidated damages and demands, it is opposed to the weight of authority.

6—8 R. C. L. 533, citing Sullivan v. McMillan, supra.

rule is correct on principle, as there seems to be no reason why, from the day on which a court gives judgment, the sum for which judgment is given should not be regarded as a liquidated amount due.

96. **Statutory Rules.**—Some states have statutes permitting a jury to allow legal interest, in its discretion, in a tort case wherein malice, fraud, or oppression is shown, making its allowance somewhat like that of exemplary damages. This is only an example of the many statutory provisions made for the allowance of interest in various kinds of cases. Such provisions, whether wise or not, have added much to the already great confusion brought about by conflicting common law holdings on the subject.

CASE ILLUSTRATIONS

1. A converts B's hay. Held, that B may recover interest. "Interest is to be allowed, as of legal right, from the time at which the value is estimated."[7]

2. Plaintiff sued defendant for severe negligent personal injuries, including the loss of a leg. The verdict assessed damages at $7,000, with 7 years' interest, $2,940, aggregating $9,940. Held, error to allow interest.[8]

3. Defendant in good faith defended a suit against plaintiff, an employee, for his salary, and thus delayed payment for a long time. Held, that plaintiff cannot get interest on his salary.[9]

4. Defendant broke his warranty in the sale of goods to plaintiff. "We think that the referee erred in giving plaintiff interest on the damages that he sustained by reason of the breach of warranty."[10]

7—Hamer v. Hathaway, (1867) 33 Calif. 117.

8—Louisville & N. R. Co. v. Wallace, (1891) 91 Tenn. 35, 17 S. W. 882, 14 L. R. A. 548.

9—Nixon v. Cutting Fruit-Packing Co., (1895) 17 Mont. 90, 42 Pac. 108.

10—Riss v. Messmore, (1890) 9 N. Y. Supp. 320, 58 N. Y. Super. Ct. 23.

PART III

DAMAGES IN CONTRACT ACTIONS AND PARTICULAR CLASSES THEREOF

CHAPTER XXVII

Contracts in General

97. **General Principles.**—The basis of an action in contract is widely different from that of an action in tort, and therefore its purpose is different. The law endeavors to place the plaintiff in a tort case in a position as nearly as possible the same as he would have occupied if the tort had never occurred; but in contract, the law does not attempt merely to place the plaintiff where he would have been if the contract had never been made, if it is possible to give him the benefit of the contract.[1]

Liability and the measure of damages in contract are, like all other matters of contractual relation, governed by the express or implied intention of the parties. One will avoid much confusion and gain much satisfaction by keeping clear in one's mind the fact that the question what is the extent of the liability of a defendant in an action on a contract is merely a question of the general law of contract, governed by the broad general principle that the obligation of the parties is determined by their intention as expressed in their agreement or implied by their acts and the circumstances. No peculiar and distinct rule, difficult to learn or to apply, fences off the law of damages in contract from the rest of the law of

1—Masterton v. Mayor, etc., of Brooklyn, (1845) 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

contract. The extent of the liability of the parties to a contract cannot be more or less than they have had in contemplation or are presumed to have had in contemplation at the time of the making of the contract.

Wherever it is possible to do so, the law seeks to place the plaintiff in a position similar to that in which he would have been if the contract had been fulfilled by the defendant; and this it does by giving him what would have been the net value of the contract to him if it had been performed. In some cases, it is impossible to prove the net value of the contract to the plaintiff; and so the defendant has contended, because of the plaintiff's inability to prove the amount of his loss, that only nominal damages should be assessed. This contention, which, if sustained, would effectually protect the breaker of the contract in a very large number of instances, finds no favor with the courts. Where the net value of the contract is incapable of proof, the plaintiff recovers the amount of his actual expenditure in preparing to perform.[2]

Damage is not the gist of the action for breach of a contract. Plaintiff shows a right of recovery when he proves a breach; and he can recover nominal damages, if he fail to prove any damage.[3]

In a legal sense, a loss may be sustained through the breach of a contract, although it can be shown that the performance would have been a positive injury, as in

2—United States v. Behan, (1884) 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. 81.

3—Marzetti v. Williams, (1830) 1 B. & Ad. 415, 109 Eng. Repr. 842, 3 E. R. C. 746; Lowe v. Turpie, (1896) 147 Ind. 652, 44 N. E. 25, 37 L. R. A. 233.

"It is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed."—Werthein v. Chicoutimi Pulp Co., [1911] A. C. 301, 7 B. R. C. 315.

This is true, whether the contract be express or implied. Marzetti v. Williams, supra.

case of failure to erect a useless structure on the land of the other contracting party.[4]

Breach of an agreement to drill a test well for oil, supports the assessment of damages, although it does not appear whether plaintiff would have found any oil, the purpose of the test well being merely to ascertain whether there was oil.[5]

The net value of the contract to the plaintiff is the gross value of the benefits anticipated, minus the amount of actual expenditure by the plaintiff in preparation to perform.[6]

98. **Entirety of Recovery.**—In contract, as in tort, the plaintiff must recover for all elements of damage, past, present, and future, in one action,[7] unless the contract is divisible and the breach or breaches thereof constitute a continuing wrong or series of wrongs, so as to give rise to successive rights of action for successive injuries inflicted thereby.[8] Damages assessed to cover all losses, whether they have already accrued or may accrue later as results of the breach, are known as entire damages.

99. **Profits.**—As a general rule, profits to be made on another and future transaction cannot be recovered as an element of damages for the breach of a contract, being

4—Chamberlain v. Parker, (1871) 45 N. Y. 569; Ardizonne v. Archer, (Okla. 1919) 178 Pac. 263.

5—Ardizonne v. Archer, (Okla. 1919) 178 Pac. 263.

6—Masterton v. Mayor, etc., of Brooklyn, (1845) 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

7—Parker v. Russell, (1882) 133 Mass. 74; Jewett v. Brooks, (1883) 134 Mass. 505.

8—"The rule is this: If the damages subsequent to the date of the writ are merely incidental to the cause of action declared on, such damages are to be assessed if they are sustained up to the time of the verdict, and even in some cases indefinitely beyond; but if the damages sustained after the date of the writ are such as are not merely incidental to and growing out of the cause of action, but may be the damages arising from a new breach or a new cause of action, they cannot be so assessed."—Lord, J., in Fay v. Guynon, (1881) 131 Mass. 31.

considered too remote and not within the contemplation of the parties. Profits on a future transaction can be recovered only if there is proof that the loss of profits claimed is a loss which must proximately arise from its breach, and which must have been contemplated by the parties when the contract was made.[9]

Where defendant, a producer of motion picture films, breaks its contract to supply certain "first-run feature" films, once a week to plaintiff's theater, and plaintiff is able to get second or third run feature films, it is held that plaintiff cannot prove the amount of profits lost by showing what his profits were on other pictures, supplied by other producers before and after the breach, nor by showing the amount of profits made by other theaters in other parts of the city, where "first-run feature" films were exhibited daily.[10]

100. **Anticipatory Breach.**—Where one party contracts to do a certain thing for another on a specified day, and simply breaks his contract on the day set for performance, it is easy to say what day is the date as of which damages must be assessed; but where one party, before the date set for performance, commits such an act as constitutes an attempt or offer to break the contract, and the attempt is acted upon or the offer accepted by the other party, we have what is known as an "anticipatory breach," for which the measure of damages is a disputed matter. As a general rule, damages in contracts are assessed as of the day of the breach, which is also the day set for performance; and, strictly speaking, there can be no breach before the date stipulated for performance; but, in the case of an "anticipatory breach," the

9—Fox v. Harding, (1851) 7 Cush. 516; Somers v. Wright, (1874) 115 Mass. 292; Masterton v. Brooklyn, (1845) 7 Hill 61, 42 Am. Dec. 38.

10—Broadway Photoplay Co. v. World Film Corporation, (1919) 225 N. Y. 104, 121 N. E. 756.

contract is simply terminated wrongfully before the time set for the parties to perform. Such premature renunciation may be treated as a breach, and, according to the weight of authority, may be sued upon at once.[11] As the party wronged loses the benefit of having the contract performed on the date stipulated for performance, his damages are, on principle, measured as of that date, and not as of the date of the so-called breach, unless special circumstances alter the amount of damage. This is the usual view.[12] The defendant has wrongfully destroyed the contract, of which the value to the plaintiff would ordinarily be the value of performance on the stipulated day.

Some courts, however, have taken the view that damages must be assessed as of the date of the anticipatory breach. The comparative ease of thus assessing damages has unquestionably influenced the courts adopting the minority rule.[13]

Although it is very questionable whether, on strict principle, a mere notice of a party, before time for per-

11—See Hochster v. De la Tour, (1853) 2 El. & Bl. 678, 22 L. J. Q. B. 455-460, 6 E. R. C. 576.

12—Roper v. Johnson, (1873) L. R. 8 C. P. 167.

"The plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself."—Roehm v. Horst, (1900) 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. 780.

13—"Where the contract * * * is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance. The basis upon which to estimate the damages, therefore, is just as fixed and easily ascertained in cases like the present, as in actions predicated upon a failure to perform at the day."—Masterton v. Mayor of Brooklyn, (1845) 7 Hill (N. Y.) 61, 42 Am. Dec. 38. The legal proposition herein contained does not seem sound on principle.

formance, that he is not going to perform, is a breach at all, before acted upon by the other party, it seems necessary, in many cases, to treat it as such, for the purpose of placing upon plaintiff a duty to avoid unnecessary damage. Where a vendee, before time set for delivery, cancels his contract, it is held, by an overwhelming weight of authority, that there is a breach, putting upon the vendor the duty to avoid unnecessary loss, and that the vendor cannot recover the purchase price as such.

For instance, A contracts to buy a machine of B. Later, A gives B notice of his unconditional cancellation of the contract. B refuses to accept this cancellation, and sends the machine to A. B cannot recover the price of the machine or freight thereon, but can recover for only such losses as he has sustained as a natural and probable result of the breach.[14]

The plaintiff may, of course, in any of these cases, wait until the arrival of the time set for performance, and then sue and recover for his actual damage, which is usually then easier to compute than at the time of the anticipatory breach.

101. **Partial Performance.**—Where the plaintiff has partly performed the contract and has been wrongfully prevented by the defendant from performing in full, the plaintiff may elect to recover either the net value of the contract or the value of the service rendered or thing transferred to the defendant or the amount of money expended under the contract.[15] In such a case he may

14—Hart-Parr Co. v. Finley, (1915) 31 N. Dak. 130, 153 N. W. 137, Ann. Cas. 1917 E 706.

See also Hosmer v. Wilson, (1859) 7 Mich. 294, 74 Am. Dec. 716; Holt v. United Security, etc., Co., (1909) 76 N. J. Law 585, 72 Atl. 301, 21 L. R. A. (N. S.) 691; Greenwall Theatrical Circuit Co. v. Markowitz, (1904) 97 Tex. 479, 79 S. W. 1069, 65 L. R. A. 302.

15—Valente v. Weinberg, (1907) 80 Conn. 134, 67 Atl. 369; Hemminger v. Western Assurance Co., (1893) 95 Mich. 355, 54 N. W. 949.

recover the actual value of what he has done, even though such value be in excess of the contract rate.[16]

But a different situation arises where the plaintiff has been, without any fault of himself or defendant, prevented from fully performing the whole contract. Just as a party or the parties to a contract are sometimes excused from performing any part of a contract at all, so a failure to complete performance may be excused, when only part of the work under the contract has been accomplished; and thus a situation comes about in which it is both logical and necessary that a recovery be allowed for part performance, but unnecessary and unjust that the net value of the entire contract be allowed.[17] Under such circumstances, the plaintiff who has partly performed is entitled to recover on a *quantum meruit* the value of what he has already done, unless to allow this would be to compensate him at a higher rate than that allowed by the contract, in which case he is entitled to recover only a part of the stated consideration in the same proportion to the whole consideration as his part performance bears to full performance.[18] But where a contract is entire, and one party is willing to complete the performance and is not in default, and the other party violates the contract by failing or refusing to perform, the violator cannot recover on a *quantum meruit* for what he has done.[19] It was formerly held that, where the

16—Hemminger v. Western Assurance Co., supra; Doughty v. O'Donnell, (1871) 4 Daly (N. Y.) 60.

17—Doster v. Brown, (1858) 25 Ga. 24, 71 Am. Dec. 153.

18—Walsh v. Fisher, (1899) 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810. See also Clark v. Franklin, (1836) 7 Leigh (Va.) 1.

19—Galvin v. Prentice, (1871) 45 N. Y. 162, 6 Am. Rep. 58. "When they found that they were operating at a loss, they had the option to complete the contract, recover the contract price, and submit to the loss, or to abandon the contract, lose the work they had done, and be subject to whatever damages might be recoverable for the breach of the contract. * * * It would be obviously inconsistent with common justice that plaintiffs should recover pro tanto on the contract which they had substantially violated."

service contracted for is entire and the contractor is, without fault of either party, rendered unable to complete his performance after performing part of the service, he could not recover on a *quantum meruit* for what services he had already performed;[20] but the modern American holdings modify this doctrine to the extent of saying that, where an act of God, such as an unanticipated illness, prevents an employee under a contract from completing his service, he may recover on a *quantum meruit* for what services he has rendered.[21]

Where the plaintiff has entered into a special contract to perform certain work for the defendant, and to furnish materials, and the work is done and the materials are furnished, but not in the manner agreed upon, the plaintiff cannot recover the agreed price; but, as the work and materials are of some benefit to the other contracting party, the plaintiff may recover on a *quantum meruit* for the work done and the materials furnished, if the defendant has not prohibited the plaintiff from proceeding with the work and has not rejected it.[22]

102. **Complete Performance.**—Where the plaintiff has fully performed and the defendant's breach of the contract comprises nothing but a total failure to pay the plaintiff a certain sum agreed upon in the contract, the measure of damages is such sum.[23] In cases wherein the plaintiff has, at the request of the defendant, done a certain service or delivered a certain thing to become the property of the defendant, with no agreement as to the amount to be paid by the defendant therefor, the law

—Johnson v. Fehsefeldt, (1908) 106 Minn. 202, 118 N. W. 797, 20 L. R. A. (N. S.) 1069.

20—Cutter v. Powell, (1795) 6 T. R. 320, 6 E. R. C. 627, 2 Sm. L. Cas. 1.

21—Wolf v. Howes, (1859) 20 N. Y. 197.

22—Katz v. Bedford, (1888) 77 Calif. 319, 19 Pac. 523, 1 L. R. A. 826; Hayward v. Leonard, (1828) 7 Pick. (Mass.) 181, 19 Am. Dec. 268.

23—Puritan Coke Co. v. Clark, (1903) 204 Pa. 556, 54 Atl. 350.

implies an obligation to pay the reasonable value of the service or thing.[24]

103. Direct and Consequential Damages.[25]—Here, as in tort, damages for direct injury are always recoverable. Here also, as in tort, consequential damages cannot always be recovered, being a recoverable element of damage only when proximate.[26] The question of proximity of cause does not, however, arise so often in contract as does the question of naturalness and probability. As contract rights are based upon the express or implied intention of the parties, and it does not seem likely that they have intended that one of the parties should become liable for an injurious result such as did not, at the time of the making of the contract, appear sufficiently natural and probable to be contemplated by them as a possible result of a breach, it follows that consequential damages can be recovered only for damage that is a natural and probable consequence of the breach.[27] A large part of the difficulty attending the study and practice of the law of damages in contract arises in cases involving consequential damages. The parties always contemplate, or must be taken to have contemplated, the direct results of a breach; but no rule of law can ever afford any real guidance as to naturalness and probability in particular cases. Here, as in regard to proximity, each case is, in a measure, a creature standing on its own feet.

104. Damages Upon Failure of Consideration.—Where one party expressly agrees to do a stipulated act for the other party to a contract or to deliver a stipulated thing to him, and does nothing or delivers a worthless article instead of the one agreed upon, the other party may

24—Acebal v. Levy, (1834) 10 Bing. 376, 131 Eng. Repr. 949.

25—See Chapter IV.

26—Leonard v. New York, etc., Tel. Co., (1870) 41 N. Y. 544, 1 Am. Rep. 446.

27—Hadley v. Baxendale, (1854) 9 Exch. 341, 5 E. R. C. 502.

either sue for damages on the express contract or rescind the contract, return any article he has received under the contract, and recover back any sum he has paid, with interest thereon.[28] If he does the latter, he is relying, not upon the express contract, but upon the implied contractual obligation of the unjustly enriched party to refund, irrespective of the contractual relations of the parties as they have grown out of their express agreement.

105. **Both Parties in Default.**—Where one party is not ready and willing to perform on his part, and the other party cannot perform, neither party causes the other party any loss, and so no damages can be assessed.[29] In such a case, theoretically, each party may claim nominal damages of the other; but, in actual practice, so idle a procedure would not be followed.[30]

106. **Non-Pecuniary Elements.**—Seldom do non-pecuniary elements of damage figure in an action upon a contract. This is not because there is any rule that such elements can never be taken into account in contract, as is sometimes erroneously supposed; but it is rather because such elements are usually either not proximate results or are not such results as are properly to be regarded as having been within the contemplation of the parties as natural and probable results of a breach. Such non-pecuniary elements as physical pain and mental suffering are seldom, if ever, proximate results of a breach of an ordinary business contract; nor can it be said that the parties to such a contract ever intend to assume the burden of compensating each other for such elements as these, in the event of a breach. As is seen in our chapter

28—Pope v. Campbell, (1805) Hardin (Ky.) 34, 3 Am. Dec. 722.

29—Nelson v. Plimpton, etc., Co., (1874) 55 N. Y. 480.

30—See Suth. Dam. § 703.

on mental suffering,[31] however, there are some contracts of such a nature as to make mental suffering so likely a result of a breach that it may properly be considered as an element of damage; but most contracts are not of this kind. Besides, exemplary damages, even in jurisdictions where they are allowed in tort, are not assessed in purely contractual actions; and so the question of malice, willfulness, or evil motive, has no real place in this field. Breach of promise may seem to constitute an exception; but, as such, it is more apparent than real, since, for most purposes, it is treated as a tort. Likewise, in studying the cases in contract against carriers, wherein exemplary damages have sometimes been allowed, it must be borne in mind that, because the carrier has violated a common law duty, the plaintiff could have sued him in tort, in which case exemplary damages could have been allowed anyway; and so the cases of this kind are more anomalous in form than in substance. Everything considered, nonpecuniary elements of damage play a very small part in contract actions.

107. **Avoidable Consequences.** — A person who is wronged by the breach of a contract is bound to take reasonable measures to avoid or lighten his loss, just as he would be under a duty to take reasonable precautions to prevent or mitigate damage if he were tortiously injured.[32] Where an employer wrongfully discharges an employee during the agreed period of service, the employee is under a duty to make his loss as light as possible by making reasonable efforts to secure similar employment.[33] So also, where the plaintiff has contracted to do a specific piece of work for the defendant and the

31—Chapter XXI.

32—See the following: Chapter V, "Avoidable Consequences;" Chapter XXXI, "Contracts for Work and Services;" and Chapter XXIX, "Sales and Contracts to Sell."

33—Sutherland v. Wyer, (1877) 67 Me. 64; Howard v. Daly, (1875) 61 N. Y. 362, 19 Am. Rep. 285.

latter has notified the former that he desires to have work cease, the plaintiff cannot continue work and charge the defendant therefor;[34] in such a case, he must cease work, and he may then recover damages assessed on the basis stated earlier in this chapter.[35] The same general principle as to avoidable consequences prevails throughout the law of damages in contracts.

108. **Interference with Contract or with Right to Contract.**—A subject as yet little developed in case law is the tort known as interference with contract or with the right to contract. Most instances of interference with a contract or inducements not to make a contract are simply cases of *damnum absque injuria*. A has a contract with B, by which A is to furnish B certain goods. C, without malice, and merely in the course of his business, offers B similar goods for less money, before delivery by A. B buys of C and notifies A of his rescission. C has committed no legal wrong against A, although he has really caused B's breach. Likewise, where two dealers are trying to sell similar goods to one customer, one dealer, by his sale, often prevents the other dealer from selling, there is no legal wrong. These are simply cases of *damnum absque injuria*, occurring about us every day, and too obvious to warrant further discussion.

Where one person *maliciously* interferes with the contracts or business of another, a different situation arises. Malicious interference of this kind is a tort.

The amount of damages depends upon the provisions of the contract and the amount of loss proximately resulting from its breach. Certainty will probably often play a large part in cases of this kind. As to measure of damages, the action must, to a great degree, resemble contract.

34—Ware Bros. Co. v. Cortland, etc., (1908) 192 N. Y. 439, 85 N. E. 666.

35—See p. 205.

But, as the wrong upon which the action is based is a tort, it would seem that exemplary damages might be assessed in appropriate cases.

The most important cases in this field have been those brought for malicious interference by laborers with sales or employment by an "unfair" employer of labor.[36]

Where a purchaser of a railroad ticket has agreed with the carrier not to transfer it, and a ticket broker induces him to violate his contract by selling it to him, the broker's act is actionable as an interference with the contract.[37]

CASE ILLUSTRATIONS

1. A customer deposits money with a banker, who violates his implied contract to honor the customer's checks. The customer does not happen to be damaged. Yet he may maintain his action and get nominal damages.[38]

2. Plaintiff contracted with defendant to cultivate defendant's farm for one year from a certain date. When only three and one-half months of the year had elapsed, defendant ordered plaintiff off the premises, refused to allow him to go on with the contract, and let the land to a stranger. "The damages, like the contract, were entire, and all accrued on the day when the contract was repudiated. * * * They were measured by the value of the contract of which the plaintiff was deprived, and did not consist of a series of items, although, for the purpose of estimating the value, the items on each side of the account during the year, as well after as before the breach, were properly admissible." [39]

3. A contracts to erect a building for B, knowing that B intends to use it in his merchandise business, although that fact is not mentioned in the contract. Held, that B may, upon breach by A, recover for loss of prospective profits by reason of the

36—Loewe v. Lawlor, (1908) 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. 301, 13 Ann. Cas. 815.

37—Delaware, L. & W. R. Co. v. Frank, (1901) 110 Fed. 689.

38—Marzetti v. Williams, (1830) 1 B. & Ad. 415, 109 Eng. Repr. 842, 3 E. R. C. 746.

39—Jewett v. Brooks, (1883) 134 Mass. 505.

breach, if such profits are not too uncertain and contingent, since such a loss was within the contemplation of the parties.[40]

4. In consideration of certain services to be done by plaintiff, defendant agreed, in effect, to pay $200 or the equivalent of this amount in loam at a specified price per cubic yard. Held, that the actual value of the loam is not the measure of plaintiff's compensation, but merely the $200.[41]

40—Dondis v. Borden, (Mass. 1918) 119 N. E. 184. See also Weston v. Boston & M. R. Co., (1906) 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825.

41—Strout v. Joy, (1911) 108 Me. 267, 80 Atl. 830.

CHAPTER XXVIII

Contracts Relating to Real Estate

109. **Failure of Vendor to Convey.**—The measure of damages for the failure of the vendor of realty to fulfill his contract by conveying to the vendee, varies according to the circumstances of the case.

Where the vendor has, in good faith, entered into a contract to convey land to which he thinks he has good title, it might naturally be supposed that he would, upon finding that he had not title to convey and failing to convey to the vendee, be held liable for all natural and probable consequences of his breach, despite his good faith. In other branches of the law of contract, we see that good faith of the defendant will not prevent the operation of the usual rule as to damages; but many of the cases, especially the earlier ones, have made this an exception or apparent exception to the general rule as to damages in contract, holding that, in such a case, if the vendee has paid the purchase price or a part thereof, he has a right only to the return of his money, with interest;[1] and, naturally, courts holding thus come to the conclusion that, if the vendee has paid nothing, he can get only nominal damages for the breach.[2] Blackstone, J., in deciding the leading case holding to this view, says: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected."[3] If this

1—Flureau v. Thornhill, (1776) 2 W. Bl. 1078, 96 Eng. Repr. 635.

2—Mack v. Patchin, (1870) 42 N. Y. 167; Margraf v. Muir, (1874) 57 N. Y. 155.

3—Flureau v. Thornhill, supra.

statement, which represents the English view of the *rationale* of the rule, accords with business usage, these cases constitute rather an apparent than a real exception to the general principle that the breaker of a contract is liable for all elements of damage that were within the contemplation of the parties as natural and probable consequences of a breach; for this statement indicates that the parties do not intend that a party who contracts *bona fide* to convey certain realty, shall be held liable for his inability to do so. Explained otherwise, the rule cannot be other than anomalous. But Blackstone's above attempt at justifying the rule is not always accepted at its face value. Mason, J., in Pumpelly v. Phelps,[4] says: "There has never seemed to me to have been any very good foundation for the rule, which excused a party from the performance of his contract, to sell and convey lands, because he had not the title which he had agreed to convey. There seems to have been considerable diversity of opinion in the courts as to the grounds upon which the rule itself is based * * * while in this country the rule is based upon the analogy between this class of cases and actions for breach of covenant of warranty of title. * * * The reasons assigned for this rule in actions for a breach of covenant of warranty of title can scarcely apply to these preliminary contracts to sell and convey title at a future time. In the latter case the vendee knows he has not got the title, and that perhaps he may never get it; and if he will go on and make expenditures under,

4—Pumpelly v. Phelps, (1869) 40 N. Y. 59, 100 Am. Dec. 463, citing: Baldwin v. Munn, 2 Wend. (N. Y.) 399, 20 Am. Dec. 627; Peters v. McKeon, (1847) 4 Denio (N. Y.) 546.

See similar rule as to breach of warranty of title, infra, p. 216.

"One very strong reason for limiting the recovery to the consideration money and interest in cases free from bad faith is that the measure of damages is thus made to conform to the rule where the party assumes to convey land which he does not own, and an action is brought against him on the covenants of title contained in his deed."—Cooley, J., in Hammond v. Hannin, (1870) 21 Mich. 374, 4 Am. Rep. 490.

such circumstances it is his own fault; and besides, these preliminary contracts to convey generally have but a short time to run, and there is seldom any such opportunity for the growth of towns, or a large increase in the value of the property as there is in these covenants in deeds, which run with the land through all time."

"The true rule seems to be that whatever the reason for the failure to convey, the measure of damages is the market value at the time of the breach, with interest, less the amount of the purchase price unpaid."[5] This is true according to the weight of modern authority.

The wilful refusal of the vendor to convey a title which he actually holds and which he has contracted to convey to the vendee, or the vendor's failure to convey a title which, at the time of contracting, he knew he had no right or power to convey, according to some cases, stands on a very different footing from that of the failure of the *bona fide* contractor to convey, who finds himself unable to do so. Whether such *mala fide* contractor finds himself in a jurisdiction administering the first of the above stated rules as to the *bona fide* contractor or in one administering the second, he is in the same position as that of the breaker of any other kind of contract, and he is liable for all the natural and probable results of his breach. He must compensate the vendee for his loss of bargain, which means that the measure of damages for his breach before any consideration has passed is the difference between the value of the land at the time set for conveyance, and the contract price, as in the case of breach of a contract to sell personalty. If, in such a case, the vendor's breach occurs after the payment of the purchase price, the measure of damages is the value of the realty at the time of the breach.[6]

5—29 Am. & Eng. Encyc. of Law 725, and cases there cited.

6—Hopkins v. Lee, (1821) 19 U. S. (6 Wheat.) 109, 5 L. ed. 218.

The measure of damages is the

110. **Breach of Grantor's Covenants in Conveyance.**—Upon breach of the grantor's covenant of warranty of title, it might be supposed that the general rule as to damages in contract would apply, and that the vendee would be entitled to be compensated for loss of his bargain; but the vendee's measure of damages for breach of warranty affecting the whole tract is usually the purchase price paid, with costs of eviction suit and with interest on the purchase price from the date of the purchase; and, in the case of a failure of the title as to only part of the tract sold, the return of purchase money and interest thereon is proportioned to the whole purchase price as the value of the part to which title has failed is proportioned to the whole tract, value and not acreage being the basis of the calculation.[7]

Where defendant broke covenants of seizin and right to convey, contained in a deed from defendant to plaintiff's testatrix, and the consideration for the deed was the conveyance to a third party of the right to redeem certain real estate belonging to testatrix, and the conveyance to a third party of certain personal property, the measure of damages is the value of the conveyances made in consideration.[8] The fact that the consideration is paid or delivered to another person than the grantor, or that it

value of the land at the time when it was to be conveyed, and not its value at the time of making the contract.—Plummer v. Rigdon, (1875) 78 Ill. 222, 20 Am. Rep. 261.

7—See Tiffany on Real Property, § 400, and cases there cited. "The measure of damages for a breach of a covenant for quiet enjoyment or of warranty is, by the weight of authority, the same as that for breach of the covenants of seisin or of right to convey."—Id.

8—Hodges v. Thayer, (1872) 110 Mass. 286. "The general rule is well settled that the measure of damages for breach of this covenant is the consideration paid, or price agreed upon for the conveyance. The actual consideration may be proved for this purpose by parol evidence, even in contradiction to the recital thereof in the deed itself. It does not modify the rule, if the actual consideration was paid in other commodities than money, or even in other real estate. It only requires that the value of such other property be ascertained."

is, before delivery, the property of another person than the grantee, makes no difference in the rule as to measure of damages, provided only that such consideration and such manner of delivery are those agreed upon.[9]

Where the value of the consideration is incapable of satisfactory proof, the value of the land attempted to be conveyed, with interest from the date of the deed, is the only practicable measure of damages.[10]

Defendant sold plaintiff certain lands, as to some of which title failed. Should defendant be permitted to show that the lands of which there was a failure of title were of quality inferior to that of the other lands conveyed by the same deed? Yes. "This appears to be reasonable; and the rule would operate with equal justice as to all the parties to a conveyance. Suppose a valuable stream of water with expensive improvements upon it, with 10 acres of adjoining barren land, was sold for $10,000; and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land, would it not be unjust that the grantee should be limited in damages under his covenants, to an apportionment according to the number of acres lost, when the sole inducement to the purchase was defeated; and the whole value of the purchase had failed? So, on the other hand, if only the title

9—Hodges v. Thayer, supra. "Their contract creates the privity between them in relation to the consideration, and constitutes it as the price of the agreed conveyance. It thereby becomes the measure of the grantee's loss. In the case of Byrnes v. Rich, (1855) 5 Gray (Mass.) 518, there was no consideration or price agreed upon between the grantor and grantee. So far as that was concerned, each had a separate agreement with a third party. The deed passed as the result of two different agreements, and was made directly from the grantor to the grantee as a matter of convenience, and not in execution of an agreement between them. Each was a stranger to the consideration by which the other was affected. There being no price agreed upon as between them, the value of the land attempted to be conveyed was resorted to as the proper measure in the absence of any other."

10—Smith v. Strong, (1833) 14 Pick. (Mass.) 128.

to the nine barren acres failed, the vendor would feel the weight of extreme injustice if he was obliged to refund nine-tenths of the consideration money. This is not the rule of assessment. The law will apportion the damages to the measure of value between the land lost and the land preserved.'' [11]

110a. **Breach by Vendee.**—Where a vendee refuses to take title to the land and pay the purchase price, some cases have gone so far as to permit the vendor to recover the whole purchase price, while retaining the land. But the usual and logical rule is that the question is purely one of damages and that the vendor can recover only an amount that will compensate him for his loss, which is the excess of the contract price over the market value.[12] If the contract price be not in excess of the market value, the vendor's damages will be nominal.

111. **Breach of Lessor's Contract by Withholding Possession from Lessee or Wrongfully Evicting Him.**—Where a lessor breaks the agreement contained in his lease by preventing the lessee from taking possession or by wrongfully evicting him from the land during the term of the lease, the lessee can recover for all loss naturally and proximately resulting from the lessor's wrong. The direct damage is the difference between the rental agreed upon and the actual rental value of the premises for the time during which the lessee is wrongfully kept out of possession.[13] Consequential elements of damage will vary greatly, according to the circumstances of the case. Profits reasonably certain in amount and lost as a natural probable result of such breach may be recovered.[14] Where the lessor fails to deliver to the lessee

11—Morris v. Phelps, (1809) 5 Johns. (N. Y.) 49, 4 Am. Dec. 323.

12—Laird v. Pim, (1841) 7 M. & W. 474, 151 Eng. Repr. 852.

13—Trull v. Granger, (1853) 8 N. Y. 115.

14—Raynor v. Val. Blatz Brewing Co., (1898) 100 Wis. 414, 76 N. W. 343.

the farm leased, the latter has a right to recover the amount of such profits as can be proven with reasonable certainty. Loss of the usual profits made in farming such a farm must have been in the contemplation of the parties as a probable result of such a breach.[15] But profits which the lessee expected to make by a use of the premises for an illegal purpose cannot be made a basis of recovery.[16]

112. **Failure of Lessor to Make Repairs Covenanted for.**—The measure of damages for breach of a covenant of the landlord to repair varies according to the facts in the case. If the breach makes it impossible for the tenant to make use of the premises, his measure of damages is the rental value of the property for the time during which the breach deprives him of the use of the premises.[17] If the tenant, in order to avoid the injurious consequences of the breach, makes the repairs himself, he can recover the necessary expenditure made for that purpose.[18]

113. **Breach of Tenant's Covenant to Make Repairs.**—Where, during the continuance of his term, the tenant breaks his covenant to keep the premises in repair, the landlord may recover the loss he has incurred by reason of the diminution in the market value of his reversion. The reasons for this rule are that the landlord cannot avoid the consequences of the breach by making the repairs himself, as he has no legal right to enter upon the land; and further, that the loss in value of the rever-

15—Stewart v. Murphy, (1915) 95 Kan. 421, 148 Pac. 609, Ann. Cas. 1917 C 612.

See also O'Neal v. Bainbridge, (1915) 94 Kan. 518, 146 Pac. 1165.

16—Eagan v. Browne, (1908) 112 N. Y. Supp. 689, 128 App. Div. 184.

17—Winne v. Kelley, (1872) 34 Ia. 339.

18—Fillebrown v. Hoar, (1878) 124 Mass. 580.

sion is immediate, the amount which it will bring in the market being diminished at once.[19]

Where, however, the breach consists simply of the tenant's leaving the premises out of repair at the end of the term, the landlord, having regained possession, is in a position to make the repairs himself; and so his recovery is limited to the cost of making the repairs.[20]

CASE ILLUSTRATIONS

1. A conveys 320 acres of land to B, giving a covenant of warranty of title. 40 acres of the tract are subject to an incumbrance. "The damages for an entire failure of title to forty acres, of a tract of three hundred and twenty acres * * * would be an amount which would bear the same arithmetical proportion towards the purchase money, as the real value of the forty acres would to the real value of the entire tract of three hundred and twenty acres. * * * The damage here suffered, and for which a recovery should be allowed, is the diminished value of the whole tract of land, the title of which the defendant warranted, by reason of the incumbrance; or, in other words, the difference between the value of the whole tract, if the title were good, and its value as depreciated by the incumbrance."[21]

2. Defendants sold plaintiff land, covenanting against incumbrances. There were incumbrances; but plaintiff's possession was not disturbed, and he did not pay the mortgage or any lien on the land. Held, that plaintiff is entitled to only nominal damages.[22]

3. A leases to B a room for art studio purposes, and to C a portion of the same building for use in an automobile business. C, acting within the terms of his lease, caused so much vibration that B had to move her art business from the leased premises before the expiration of her lease. Held, that A's lease to C for such purposes amounted to an eviction of B, and

19—Watriss v. First National Bank, (1881) 130 Mass. 343.

20—Id.

21—Clark v. Zeigler, (1885) 79 Ala. 346.

22—McGuckin v. Milbank, (1897) 152 N. Y. 297, 46 N. E. 490.

that B could recover of A for the expense of moving and installing herself in a new studio, for loss of time, and for the destruction of a glass picture shaken down and broken by the vibration caused by the presence of automobiles in the building.[23]

23—Wade v. Herndl, (1906) 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591.

CHAPTER XXIX

Sales and Contracts to Sell Personalty

114. **Distinction Between Actual Sales and Contracts to Sell.**—A sale is a transfer of the title to goods for a price. A contract to sell is an agreement to transfer title to goods at some future time or upon a certain event or contingency. It is evident that the measure of damages is not the same in an action growing out of a sale as it would be in one arising out of a contract to sell. In the former case, the title has passed, so that the vendee has the goods or property in them; while, in the latter case, the vendee has not yet taken title to the goods. This distinction is important in its effect upon the possible position of the seller. Where an actual sale has taken place, so that title has passed to the buyer, the seller can maintain his action for the price; but, in the case of a mere contract to sell, no action for the price accrues before the happening of a certain condition, which is usually delivery of the goods or some act indicating change of ownership. Of course the vendor and vendee may make their respective promises to deliver goods and pay money independent undertakings, or they may agree for "payment in advance," reversing the usual order of delivery first and then payment. We thus find many instances in which a contract is so framed as to give the vendor a right to be paid the purchase price before passage of title or independently of it. As we shall see, the measure of damages for non-acceptance of goods under an executory contract is not the same as the purchase price which the vendor can recover if title has passed.

115. **Failure of Vendor to Supply Goods.**—Ordinarily, the measure of damages for a failure of a vendor to supply goods that he has contracted to supply, is the excess which the vendee is obliged to pay over and above the contract price in order to get the goods at the time and place of delivery stipulated for in the contract. Because the amount the vendee has to pay is usually the market price, he may usually recover the excess of the market price over the contract price at the stipulated time and place of delivery.[1] This does not mean, however, that the vendee is obliged, in every instance, to buy at once upon breach in order to have the right to be reimbursed for his actual outlay in excess of the contract price, but only that he must buy within a reasonable time after the breach.[2] If the goods have no market value, their reasonable value is considered instead of their market value, or, if the goods were to be made to fill the contract, the reasonable cost of having them made by another manufacturer than the vendor, is taken as their value.[3] If

1—Gainsford v. Carroll, (1824) 2 Barn. & C. 624, 107 Eng. Repr. 516, 9 E. C. L. 273; Shepherd v. Hampton, (1818) 3 Wheat. (U. S.) 200; 4 L. ed. 369; Moffitt-West Drug Co. v. Byrd, (1899) 92 Fed. 290, 34 C. C. A. 351; Smith v. Dunlap, (1850) 12 Ill. 184; Shaw v. Nudd, (1829) 8 Pick. (Mass.) 9. But, as the law intends only compensation for actual loss, if the vendee has the good fortune to buy for less than the market price, he can recover only the excess of his actual payment over the contract price. Theiss v. Weiss, (1895) 166 Pa. 9, 31 Atl. 63, 45 Am. St. Rep. 638.

The only market price considered is a fair market price. An unnaturally inflated market price is no criterion. R. M. Benj. Prin. Sales (2d ed.) p. 218; Kountz v. Kirkpatrick, (1872) 72 Pa. 376, 13 Am. Rep. 687.

2—"The buyer need not go into the market the next day, but is entitled to the difference in price at the time when he might reasonably procure the article."—Josling v. Irvine, (1861) 6 Hurl. & N. 512, 158 Eng. Repr. 210.

3—"If there was no market value for such iron, then the next best evidence would be its value, ascertained by those whose experience in dealing with iron of this character would enable them to state its value."—Warren v. Mayer Mfg. Co., (1901) 161 Mo. 112, 61 S. W. 644.

"When the property contracted for is not readily obtainable on the market at the place of deliv-

the market value is less than the contract price, the vendee can get only nominal damages for the non-delivery by the vendor, as he suffers no actual damage whatever, in the absence of special damage.[4]

In some cases, however, it happens that the parties contemplate a greater loss in case of breach than would ordinarily accrue. Where the goods bought are for a particular purpose and the seller knows of this purpose, he may be liable in a greater sum than the mere difference between the contract price and the market price. The question here, as in all contract cases, is: "What did the parties intend and contemplate?" If they contemplated no more than the parties usually contemplate in such cases, they naturally expect that the default of the vendor will not cause the vendee any more loss than the difference between the agreed price and the market price at the time and place of delivery; but, if the vendor contracts knowing of a subcontract under which the vendee will suffer a certain loss in the event of a breach by him, the original vendor, or if he contracts knowing that the vendee is intending to use the goods for a certain purpose, in which the vendee may fail in the event of the vendor's breach, the vendor is liable for the natural, probable, and proximate results of his breach, which may far exceed the amount arrived at according to the usual measure of damages.[5] Even in such a case, however, the

ery under the contract, it has been held that the purchaser may recover the difference between the agreed price and the actual cost of procuring similar property by due diligence."—McFadden v. Shanley, (1914) 16 Ariz. 91, 141 Pac. 732.

4—Bush v. Canfield, (1818) 2 Conn. 485.

5—"The general rule of damages, ordinarily, is the difference between the contract price and the market value of the article at the time and place of delivery fixed by the contract. This is not the invariable rule in all cases. The general rule is, that the party injured by a breach of a contract, is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. In commodities commonly purchasable in the market, it is

vendee cannot sit idly by and make no attempt to avoid consequences by going into the market, if there be one, and purchasing such articles as those contracted for.[6] So sometimes the loss of profits on a subcontract or injury to business is a probable, proximate and certain result of a breach by the vendor, and is therefore a recoverable element of damage.[7] There is, however, of-

safe to say that the purchaser is made whole, when he is allowed to recover the difference between the contract price and the value of the article in the market at the time and place of delivery; because he can supply himself with this article by going into the market and making his purchase at such price, and these are all the damages he is ordinarily entitled to recover, for nothing beyond this is within the contemplation of the parties when they entered into the contract.

"This rule, however, is changed when the vendor knows that the purchaser has an existing contract for a re-sale at an advanced price, and that the purchase is made to fulfill such contract, and the vendor agrees to supply the article to enable him to fulfill the same, because those profits which would accrue to the purchaser upon fulfilling the contract of re-sale, may justly be said to have entered into the contemplation of the parties in making the contract. (Griffin v. Colver, 16 N. Y. R. 493.) This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that where a party sustains a loss by reason of a breach of a contract, he shall, so far as money can do it, be placed in the same situation with respect to damages, as if the contract had been performed."—Messmore v. New York Shot & Lead Co., (1869) 40 N. Y. 422.

6—It has even been held that, in order to avoid consequences, he must buy of the offending party.—Lawrence v. Porter, (1894) 63 Fed. 62, 11 C. C. A. 27, 26 L. R. A. 167.

It is held that, where the buyer has already paid the purchase price to the seller, the buyer cannot be required, in order to avoid damage, to go into the market and buy again. In a case in carriers, precisely the same principle is well stated as follows: "It would be very unreasonable to require one, who has bought and paid for an article, to have the money in his pocket with which to buy a second, in case of the nondelivery of the first. This demand comes with an ill grace from a party by whose fault there had been a failure of delivery." Illinois Central R. Co. v. Cobb, Christy & Co., (1872) 64 Ill. 128.

7—Messmore v. New York Shot & Lead Co., (1869) 40 N. Y. 422.

The seller in default would not, however, be liable for the loss of such profits if the fact of the existence of the sub-contract had not been communicated to him. Grebert-Borgnis v. Nugent, (1885) 15 Q. B. D. 85. The latter case

ten such lack of certainty of proof as to profits as to bar their recovery.[8] It must be remembered that conjectural and speculative profits are no more a basis of compensation here than in any other field. Profits such as would have been realized by the vendee on independent and collateral undertakings, even though such undertakings were entered into in consequence of and reliance upon the principal contract, are too remote and uncertain to constitute a recoverable element of damage.[9] But a subcontract is not independent of the principal contract, if the principal contract is entered into with the subcontract in the contemplation of the parties.[10]

Where the article contracted for has no market value and the vendor knows that it is to be used in filling a subcontract and does not know what the subcontract price is, he cannot escape with an assessment of nominal damages, but is held to be liable for the loss of profits arising as a certain, proximate, and probable result of his breach of contract.[11] But if the subcontract price is un-

contains a good discussion of the subject.

8—Fox v. Harding, (1851) 7 Cush. (Mass.) 516.

See also Griffin v. Colver, (1858) 16 N. Y. 489, 69 Am. Dec. 718.

9—Fox v. Harding, supra.

10—"This action is to recover profits which would have accrued to the plaintiff by the delivery of $5,000 worth of lumber at retail prices instead of cash, with the interest paid on that sum.

"It was contended that the plaintiff could not under this agreement and declaration recover for loss of profits. But the agreement, as applied to the subject-matter, and the relations of the parties under another contract expressly referred to, clearly shows that the loss of profits claimed is the loss which must necessarily and directly arise from its breach, and which must have been contemplated by the parties when the contract was made. Profits of this description may be recovered, although as a general rule the profits of a future transaction are regarded as an element too remote to be taken into account in the estimate of damages." Somers v. Wright, (1874) 115 Mass. 292, citing: Fox v. Harding, (1851) 7 Cush. (Mass.) 516; Masterton v. Mayor of Brooklyn, (1845) 7 Hill (N. Y.) 61, 42 Am. Dec. 38.

11—Allis v. McLean, (1882) 48 Mich. 428, 12 N. W. 640; Booth v. Spuyten Duyvil Rolling Mill Co., (1875) 60 N. Y. 487. See also Equitable Gas-Light Co. v. Baltimore Coal-Tar, etc., Co., (1885) 65 Md. 73, 3 Atl. 108.

usually high, so as to afford exorbitant and unusual profits, the vendor, unless he, at the time of making the contract, knew of such profits, cannot be held liable for the loss of them. The loss of enormous and unusual profits cannot be said to be a natural and probable consequence of a breach of contract where not specially within the contemplation of the parties at the time of contracting.[12]

Where the vendor supplies goods of a quality inferior to those specified in the contract, the vendee can recover damages for all loss resulting from the breach, subject to the usual rules as to certainty and causation. The vendee may, of course, refuse to accept goods falling substantially below the requirements of the contract; but, if he accepts them, he has a right to damages for losses suffered as a proximate and probable result of the breach. His damages may be simply the difference between the value of the goods as they would have been if they had been as contracted for and their value as they actually were;[13] or, if the vendor has contracted, knowing that any breach as to quality would bring certain other and special losses upon the vendee, he is held liable for such losses.[14]

The vendor is held liable for all proximate and probable consequences of a delay in delivery. Here again the measure of damages to be assessed against the vendor in default is determined largely by the intention of the parties.[15]

12—Guetzkow Bros. Co. v. Andrews, (1896) 92 Wis. 214, 66 N. W. 119, 52 L. R. A. 209, 53 Am. St. Rep. 909.

13—The measure of damages, where it is practicable to remedy the defect, is the cost of remedying it. Benjamin v. Hillard, (1859) 23 How. (U. S.) 149, 16 L. ed. 518.

14—Wallace v. Knoxville Woolen Mills, (1904) 117 Ky. 450, 25 Ky. Law 1445, 78 S. W. 192.

15—The measure of damages may, in one case, be no more than the difference between the market price at the time set for delivery and the lower market price at the actual time of delivery; or there may be special elements of damage for delay. See 35 Cyc. 645,

116. **Breach of Warranty.**—For breach of warranty by the vendor, the measure of damages is the amount of the loss sustained by the vendee as a proximate, natural and probable result of the breach. Here, as in other branches of contract law, the intention and contemplation of the parties determine much. In the ordinary case, the measure of damages would be simply the amount the vendee must pay to supply the deficiency in quality or the difference between the goods as they should have been and the goods as they were;[16] but, if the vendor, knowing that the article is to be used for a particular purpose and that the vendee will not be able to procure another article of the kind and quality required, warrants the article to be of a certain quality, and the article turns out defective, so that the vendee is obliged to give up the project for which the article was purchased, the vendor may be compelled to pay special damages.[17]

Where the seller has contracted to supply building material warranted to be of a certain uniform quality, and actually supplies material of a varying quality, and the buyer, in the exercise of reasonable diligence, fail-

and cases there cited. See also Berkey & Gay Furniture Co. v. Hascall, (1890) 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65.

16—Tuttle v. Brown, (1855) 4 Gray (Mass.) 457, 64 Am. Dec. 80. "A warranty on the sale of a chattel is, in legal effect, a promise that the subject of sale corresponds with the warranty, in title, soundness, or other quality to which it relates; and is always so stated in the declaration when it is technically framed. It naturally follows that if the subject prove defective within the meaning of the warranty, the stipulation can be satisfied in no other way than by making it good. That cannot be done except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed. There is no right in the vendee to return the article and recover the price paid, unless there be fraud, or an express agreement for a return."—Cary v. Gruman, (1843) 4 Hill (N. Y.) 625, 40 Am. Dec. 299.

17—Cory v. Thames Ironworks, etc., Co., (1868) L. R. 3 Q. B. 181, 37 L. J. Q. B. 68; Whitehead v. Ryder, (1885) 139 Mass. 379, 31 N. E. 736.

ing to ascertain the fact of non-conformity to the contract, continues to use the material in building, until he ascertains the fact of breach, and then notifies the seller, who refuses to complete his performance, the measure of damages includes not only the difference between what the buyer bought and what he received, but also the expense of taking down and rebuilding the structure.[18] Of course, this is true only if the parties at the time of the making of the contract contemplate such expense as a result of a breach thereof. Likewise, where a seller of coal, knowing that the buyer, being a wholesale dealer, will re-ship the coal to customers without inspection, relying wholly upon the seller's agreement to deliver coal of the quality contracted for, the buyer's measure of damages is not limited to the difference between the value of the coal contracted for and that of the coal delivered, but includes also the expenses and necessary disbursements incurred in transportation, because of the breach.[19] These propositions are correct, according to the principles of the common law, for the damage stated was in the contemplation of the parties at the making of the contract; and they are correct under the uniform Sales Act, because of the express provisions thereof.[20]

117. **Non-acceptance by the Vendee.**—The measure and amount of the damages to be assessed in favor of a vendor against a vendee who wrongfully refuses to accept the goods contracted for, varies according to the circumstances of the case. One of the most important matters to be considered in determining the extent of the vendee's liability is the stage of the vendor's preparation at which the vendee countermands his order. If

18—Gascoigne v. Cary Brick Co., (1914) 217 Mass. 302, 104 N. E. 734, Ann. Cas. 1917 C 336.

19—Hanson v. Wittenberg, (1910) 205 Mass. 319, 91 N. E. 383.

20—Mass. Stat. 1908, c. 237, § 49; Mass. Supp. to Rev. Laws, (1902-8) p. 523, § 49.

the vendee notifies the vendor of his non-acceptance seasonably, so as to prevent his making any expenditures in preparation to fulfill the contract, the damages are confined strictly to the profits that the vendor would have made if he had been permitted to go on with the contract.[21] In this case, the vendor cannot make his damages any greater by making unnecessary expenditures or doing unnecessary work after the countermand. If, however, the vendee countermands his order after the vendor has, by purchasing or manufacturing the goods, prepared to fulfill the contract, the measure of damages is the excess of the contract price over the market price at the time and place of delivery specified in the contract.[22] Sometimes it is impossible to show a market price at the exact time and place named in the contract, and it then becomes necessary to show as nearly as possible the real value of the goods by admitting testimony as to the price a short time before or after the stipulated time of delivery, or at other markets near.[23] Upon breach by the non-acceptance of the goods, the vendor can avoid or lessen his damage by selling his goods in the market, if there be one, and the market price thus marks the extent to which he can avoid damage, so that the contract price minus the market price equals the amount of his damage. Where the goods will bring as much as, or more than, the contract price in the open market, the vendor cannot get more than nominal damages for a breach consisting merely of non-acceptance by the vendee.[24]

CASE ILLUSTRATIONS

1. Plaintiff sold defendants 10,000 boxes of glass, to be delivered on board of vessels at Antwerp for shipment to defend-

21—Clark v. Marsiglia, (1845) 1 Denio (N. Y.) 317, 43 Am. Dec. 670.

22—Dwiggins v. Clark, (1883) 94 Ind. 49, 48 Am. Rep. 140.

23—McCormick v. Hamilton, (1873) 23 Grattan (Va.) 561.

24—Unexcelled Fireworks Co. v. Polites, (1890) 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788.

ants in New York. Part of the amount was delivered; but, as evidence tended to prove, it was inferior in quality to the kind stipulated. Defendants accepted it, but broke their contract by refusing to accept any more glass. The court instructed the jury that the plaintiff was entitled to recover the difference between the contract price and the market price at New York. Held, error. The measure of damages is the difference between the contract price and the market price at the time and place of delivery. The place of delivery was Antwerp.[25]

2. Defendants agreed to buy of plaintiffs paving stones, of which there was no market value at the exact place at which they were to be delivered. There was, however, a market value at a point no great distance away and within the same city. Defendants refused to accept the stones. "If they were salable, where they lay, to be delivered elsewhere, at a price larger than the cost of delivery there, the excess of such price above the cost of delivery was the market value which should have been deducted from the contract price, in order to get at the damages." The phrase "market value" should not be too narrowly limited so as to mean the precise spot of delivery.[26]

3. Defendant agreed to buy 50,000 cigarettes from plaintiff each month during a certain period. After a time, defendant refused to accept further deliveries. The cigarettes were of a kind for which there was no market, in large quantities, and there was evidence that the goods would deteriorate if kept for a few months. Held, that the only measure of damages that would furnish proper indemnity to plaintiff is the difference between the contract price and the cost of production.[27]

4. Defendant contracted to buy seventy-three iron shutter doors of plaintiff, to be manufactured and erected. On the next day, defendant cancelled his contract, for no good reason. The measure of damages for the breach is the difference between the cost of manufacturing and delivering the article and the contract price.[28]

25—Cahen v. Platt, (1877) 69 N. Y. 348, 25 Am. Rep. 203.

26—Barry v. Cavanaugh, (1879) 127 Mass. 394.

27—Kelso v. Marshall, (1897) 48 N. Y. Supp. 728, 24 App. Div. 128, following Todd v. Gamble, (1896) 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225.

28—Worrell v. Kinnear Mfg. Co., (1905) 103 Va. 719, 49 S. E. 988, 2 Ann. Cas. 997.

5. Defendants sold steel to plaintiffs, warranting it to be first class steel, and knowing that plaintiffs would use it in making oil-drills. Immediately upon beginning to use the steel, plaintiffs found that it was defective, but continued to make it into drills. Plaintiffs had "no right, after that, to go on making drills, in the expectation of recovering for the expenses, or loss of profits of the defendants. If they could recover for making drills, they could with equal propriety recover if they had procured it to make into watch-springs, one pound of which would be worth tons of unwrought steel." [29]

29—Draper v. Sweet, (1868) 66 Barb. (N. Y.) 145.

CHAPTER XXX

Contracts to Pay or Lend Money

118. **Failure to Pay Money Owed.**—Where one party agrees to pay another a certain sum on a certain date and fails to do so, the recovery is limited to the sum agreed upon, with legal interest from the date of the breach. So, on the failure of a party to meet his obligation on a negotiable instrument, the amount recoverable is the principal and the stipulated interest to the time of the breach, plus interest at the legal rate for the time subsequent to the breach, unless a different rate has been agreed upon for the subsequent period.[1] The reason for so limiting the recovery on negotiable instruments is not that they constitute any exception to the general rule as to damages in contract, but merely that the parties to a negotiable instrument are not taken to have any consequential results in view. Their contract is in regard merely to the payment of money, and does not in any way contemplate consequences.

Where A agrees with B that B is to procure judgment against C and levy upon and expose for sale C's goods, and that A is to bid for them the amount of the judgment, and A fails to attend the sale, and the goods bring only a nominal sum, B is entitled to collect from A the amount of the judgment plus interest and costs. Such an agreement is virtually an agreement to pay the debt of another.[2]

1—This is the correct rule as to the interest for the period subsequent to the breach, on principle and according to the weight of authority, the interest for the period after the breach being mere damages. See Fearing v. Clark, (1860) 16 Gray (Mass.) 74, 77 Am. Dec. 394.

2—Wicker v. Hoppock, (1867) 6 Wall. (U. S.) 94, 18 L. ed. 752.

119. **Failure to Lend Money.**—The failure or refusal of one party to lend another money which he has agreed to lend results in direct damage to the borrower to the extent of the excess of the legal rate of interest over the contract rate agreed upon, and this is all that can ordinarily be recovered. It is presumed that the intending borrower can go into the money market and get money at the legal rate of interest, so that he is not really damaged to a greater extent than the difference between this rate and the rate agreed upon. Remote damages can no more be assessed here than elsewhere.[3] But if the borrower actually has to pay a lawful rate in excess of the legal rate, he can recover the excess of such rate over the contract rate.[4] There are instances in which the parties have entered into a contract for a loan with certain elements of consequential damage in contemplation as likely to occur in the event of the failure of the borrower to procure the money promptly at the stipulated time; and then we have the possibility of assessing damages for such consequential elements, which could not be taken into consideration in the ordinary case.[5]

3—Savings Bank v. Asbury, (1897) 117 Calif. 96, 48 Pac. 1081.

The awarding of substantial damages for breach of contract to lend money is very rare. "One dollar in legal tender is worth no more than another. * * * It must be made to appear that the borrower had been unable to obtain a like sum on like terms. It would further be necessary to show definitely and distinctly that the damage (other than that arising from having to pay a higher rate of interest) was in contemplation of the intending lender at the time he made the agreement to lend."—Anderson v. Hilton & Dodge Lumber Co., (1905) 121 Ga. 688, 49 S. E. 725.

4—"When the person who contracted to make the loan neglects or refuses to do so, and the owner is compelled to procure money elsewhere, the measure of damages is the difference, if any, between the interest he contracted to pay, and what he was compelled to pay to procure the money; not exceeding, perhaps, the highest rate allowed by law."—Lowe v. Turpie, (1896) 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233. See also: New York Life Insurance Co. v. Pope, (1902) 24 Ky. Law 485, 68 S. W. 851; McGee v. Wineholt, (1901) 23 Wash. 748, 63 Pac. 571.

5—Doushkess v. Burger Brewing Co., (1897) 47 N. Y. Supp. 312. 20 App. Div. 375.

To constitute a basis of recovery, consequential elements must be shown to have been in the contemplation of the parties.[6] Frequently the breach of an agreement to lend money gives rise to a claim for no more than nominal damages, for the stipulated interest is often, if not usually, the legal rate or higher, so that the borrower, upon breach, can simply go into the market and get money on as good terms as those of the contract and so suffers no direct loss whatever, and his consequential loss, as has been seen, cannot be made a basis of damages unless it has been contemplated by the parties at the time of making the contract.[7] In fact, in such a case as that just supposed, consequential loss would not ordinarily occur.

CASE ILLUSTRATIONS

1. A broke his contract to lend B certain money. Failing to get the money, B had to close out its business, sacrificing its property. Held, that this element of damage is too remote and entirely speculative.[8]

2. Defendant contracted to advance money with which plaintiff was to construct a mill-dam of stone and concrete in place of the wooden dam that he already had, and to furnish logs, by sawing which at a stipulated price plaintiff was to be enabled to repay the money advanced, and also to furnish other logs which the plaintiff might saw. Before defendant's breach, plaintiff, relying on his contract with defendant, tore away his wooden dam and water-house and expended several hundred dollars of his own money in procuring and preparing stone for the proposed dam. Held that, under these circumstances, plaintiff can get substantial damages, and need not show that he has tried to procure a loan elsewhere.[9]

6—Equitable Mortgage Co. v. Thorn, (Tex. Civ. App. 1894) 26 S. W. 276.

7—Lowe v. Turpie, (1896) 147 Ind. 652, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

8—C. B. Coles & Sons Co. v. Standard Lumber Co., (1909) 150 N. Car. 183, 63 S. E. 736.

9—Bixby-Theison Lumber Co. v. Evans, (1910) 167 Ala. 431, 52 So. 843, 29 L. R. A. (N. S.) 194.

CHAPTER XXXI

Contracts for Work, Labor, and Services

120. **Special and Implied Contracts.**—In deciding what is to be the measure of compensation to an employee under a contract for any kind of services, it is of first importance to know whether he is relying upon an express contract for a stated compensation per unit of time or per piece of work, or is, without an express contract or after breach of express contract, suing on a *quantum meruit* for the reasonable value of services rendered. In the former case, the obligation of the employer is express or special, and the amount of compensation upon compliance with the contract by the employee is the stated amount, no more and no less.[1] In the latter case, an express contract either never existed or is treated as being rescinded and therefore nonexistent; and so the employer's obligation is implied, and he must pay what the services rendered are reasonably worth.[2] Where services have been rendered by plaintiff at the express request of the defendant, but without an express agreement as to amount of compensation, the sum to be paid the plaintiff is not to be determined by the amount of benefit which the defendant receives. The compensation is determined by the value of the services.[3]

121. **Right of Employee to a Quantum Meruit Where He Has Not Completed His Term of Service.**—Where an

1—Brigham v. Hawley, (1855) 17 Ill. 38.

2—Stowe v. Buttrick, (1878) 125 Mass. 449.

3—Stowe v. Buttrick, (1878) 125 Mass. 449.

employee wilfully and wrongfully quits the service of his employer before the end of the term for which he has contracted to work, it has been held that he can recover nothing;[4] but the more modern and more just holding is that, even if the employee has, without excuse, quit the employer's service, he has a right to recover on a *quantum meruit* the reasonable value of the services he has rendered, minus the amount of loss caused to the employer by the breach of contract.[5] *A fortiori,* where completion of performance by the employee is excused, he may recover on a *quantum meruit* for what he has actually done, subject to a reduction as in the case above stated.[6] If the employee's service is interrupted by the act of God or inevitable necessity, it is reasonable to suppose that this is such an interruption as the parties contemplated as being possible, and that they therefore considered the performance of the service as conditioned upon freedom from such interference. Modern courts very readily allow the employee to recover on a *quantum meruit* for what he has done

4—Stark v. Parker, (1824) 2 Pick. (Mass.) 267, 13 Am. Dec. 425.

5—Britton v. Turner, (1834) 6 N. H. 481, 26 Am. Dec. 713. "In fact, we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it—that the contract being entire there can be no apportionment—and that there being an express contract no other can be implied, even upon the subsequent performance of service—is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary. Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions, the one precedent to the other, without a specific proviso to that effect."

6—Ryan v. Dayton, (1856) 25 Conn. 188, 65 Am. Dec. 560; Green v. Gilbert, (1867) 21 Wis. 401.

up to the time of interruption by sickness or other act of God or inevitable accident,[7] although this was not formerly the rule.[8]

122. **Entirety of Recovery.**—Probably no phase of the subject treated in this chapter has given courts more of difficulty than has the question whether the wrongfully discharged employee may recover damages for his whole loss, present and future, upon his bringing action before the agreed period of employment has elapsed. One view is that the contract is entire, and that therefore, although the bringing of one suit at a time prior to the end of the contract period exhausts the employee's right to damages, his compensation for loss of wages can be calculated only to the date of the trial. This is on the ground that damages for the loss of future wages would be uncertain and conjectural.[9] Another view, which is not very satisfactory in its practical workings, is that the employee may recover for losses, present and future, in one suit, even though the suit be brought before the end of the stipulated period of service.[10] The administering of such a rule necessitates speculation and wild conjecture by the jury. A third rule, which, it is submitted, is more consonant with actual justice than either of the others, is that the wrongfully discharged employee may

7—Clark v. Gilbert, (1863) 26 N. Y. 279, 84 Am. Dec. 189, allowing recovery at contract rate.

8—Cutter v. Powell, (1795) 6 T. R. 320, 2 Sm. L. Cas. 1, 6 E. R. C. 627.

9—Fowler v. Armour, (1854) 24 Ala. 194; Colburn v. Woodworth, (1860) 31 Barb. (N. Y.) 381; Gordon v. Brewster, (1858) 7 Wis. 355. "A party discharged under such circumstances has three remedies, either of which he may pursue at his election. First, he may bring a special action to recover the damages arising from such breach; and this remedy he may pursue the moment the contract is broken. Secondly, he may treat the contract as rescinded, and immediately sue on the quantum meruit, for the work actually performed. Or, thirdly, he may wait until the termination of the period for which he was hired and claim as damages the wages agreed to be paid by the contract."—Colburn v. Woodworth, supra.

10—Sutherland v. Wyer, (1877) 67 Me. 64.

sue from time to time during his contract period of service, as damage accrues. The principal case upholding this rule urges, with irresistible common sense, that the necessary effect of the first rule is, in the case of a thirty-year contract, to restrict the plaintiff's recovery to damages for only the period of the statute of limitations, which would be a period of not more than five or six years from the time of the breach, as he must bring his action within that period. The same case also points out the absurdity of the second view, which may compel the employer to pay damages for a loss of wages which may never occur or may deny the employee indemnity for a loss which later does occur.[11]

123. **Causation.**—Either party, employer or employee, upon breaking the contract is liable to the other party for all damage that is proximate, probable, and conforming to the universal requirement of certainty of proof. Where the breach consists of the employee's wrongfully quitting the employment, the employer is not always confined to such damages as would enable him to employ another to take the employee's place. If he has sustained loss which is the proximate, natural and probable result of the employee's breach, he may recover for

11—"If the action is commenced immediately after the breach, how can prospective damages be assessed for this thirty years, or for even one year? To presume that the discharged servant will not be able for a large part of that time to obtain other employment, and award him large damages, might be grossly unjust to the defendant. Again, the servant is entitled to actual indemnity, not to such speculative indemnity as must necessarily be given by awarding him prospective damages. His contract was not a speculative one, and the law should not make it such. That men can and do find employment is the general rule, and enforced idleness the exception. It should not be presumed in advance that the exceptional will occur."—McMullen v. Dickinson Co., (1895) 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511. Accord on right of employee to bring actions from time to time: Isaacs v. Davies, (1881) 68 Ga. 169.

such loss.[12] The employer has a right to recover for expenditures made in a reasonable effort to avoid consequences of the employee's breach; which expenditures usually include the whole cost of getting some one else to do the work, if the defendant, breaker of the contract, has already been paid in full,[13] or, if he has not been paid, the difference between the contract price and the actual cost of the work, if the contract price is less than the actual cost to the plaintiff.[14]

124. **Liquidation of Damages.**--Because of the very numerous attempts, some fair and others very unfair, to liquidate damages for breach of a contract of service by an employee, it becomes necessary to consider briefly the subject of stipulated damages in such contracts. The same general principles as to the validity or invalidity of an agreement for liquidated damages govern here as govern elsewhere. Attempts at liquidation of damages in these contracts usually take one of two forms: first, an agreement that the employee, upon wrongfully quitting his employment before the end of his term, shall forfeit whatever amount, then due him, remains in the hands of the employer; or, second, an agreement that the employee shall forfeit a stated sum in case of such breach. The former arrangement is not enforceable, being a very clear and flagrant case of a contract for a penalty, as the amount is without limit, or at any rate, it is certainly not limited to such an amount as would fairly compensate the employer for a breach. Therefore, in case of the breach of such a contract by the employee, he is liable only in such an amount as will fairly compensate the employer for the damages caused by the breach, the stipulation being

12—Houser v. Pearce, (1874) 13 Kan. 104.

13—Plunkett v. Meredith, (1903) 72 Ark. 3, 77 S. W. 600.

14—Truitt v. Fahey, (1902) 3 Pen. (Del.) 573, 52 Atl. 339.

treated as for a penalty.[15] In the second class of cases, we have, if the stated sum be reasonable, a case of perfectly valid liquidation of damages.[16]

125. **Avoidable Consequences.**—Where either party to an agreement for work or services breaks the agreement, it is the duty of the other party to make reasonable effort to avoid injurious consequences likely to flow from the breach, as in the case of any other kind of contract.

A worker wrongfully discharged before the end of his term of service must exercise due diligence in attempting to avoid or mitigate his loss. He is not warranted in lying idle and not attempting to secure employment with another employer, but must make a reasonable effort to make his loss as little as possible by getting work elsewhere.[17] His duty is not held, however, to necessitate his substantially changing occupations[18] or going outside the locality in which he has been working.[19] If he is successful in procuring employment at the same wages he was to procure under the contract, it is apparent that his damages are nominal. As the services under a mere contract of hire are strictly personal, the worker cannot carry out two such contracts at one time. With these facts in view, it is necessary to fix the damages of the wrongfully discharged employee under a

15—Schrimpf v. Tennessee Mfg. Co., (1887) 86 Tenn. 219, 6 S. W. 131, 6 Am. St. Rep. 832.

16—Tennessee Mfg. Co. v. James, (1892) 91 Tenn. 154, 18 S. W. 262, 15 L. R. A. 211, 30 Am. St. Rep. 865.

17—Cooper v. Stronge, etc., Co., (1910) 111 Minn. 177, 126 N. W. 541, 27 L. R. A. (N. S.) 1011, 20 Ann. Cas. 663.

18—Cooper v. Stronge, etc., Co., supra.

19—Costigan v. Mohawk, etc., R. Co., (1846) 2 Denio (N. Y.) 609, 43 Am. Dec. 758. The wrongfully discharged employee may recover at the contract rate for the service, from the time of the discharge to the end of the term, if he sues after the whole period has elapsed, unless the employer shows in mitigation that the employee has avoided or could have avoided the loss by taking another similar position in the same region.

contract of hire for a stated period, at the difference between the contract wage and the wage he is compelled to take in order to avoid as far as possible the loss resulting from his discharge.

But where the contract is to do a specific service, not personal in its nature, as to build a house, the contractor, upon breach by the other party, is not obliged to seek other contracts in order to avoid consequences; and, if the contractor does obtain other contracts, the offending party has no right to have the benefit of such other contracts subtracted from the losses for which he must compensate the contractor. The same is true as to all contracts except those for strictly personal services. The reason for the rule is that a contractor may rightfully carry out any number of contracts at any one time, if they be not for personal services, so that each contract is independent of the others, although possibly simultaneous with them in execution, and each contract stands on its own feet as to profits and losses, and losses from its breach are not increased or decreased by the making of other contracts.[20]

In no case can a contractor, who is wrongfully ordered by the other party to cease work, continue to work and thus enhance his damages.[21]

Where the defendant has contracted to do a certain service for plaintiff and has failed to do it, the plaintiff cannot stand by and permit injurious consequences to occur, but must make a reasonable effort to avoid damage, and must, if necessary and possible, make other contracts for that purpose.[22]

126. **The Doctrine of Constructive Service.**—According to the weight of authority, as already stated, it is the

20—Sullivan v. McMillan, (1896) 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239.

21—Harness v. Kentucky Fluor Spar Co., (1912) 149 Ky. 65, 147 S. W. 934, Ann. Cas. 1914 A 803.

22—Brant v. Gallup, (1885) 111 Ill. 487.

duty of the wrongfully discharged employee to avoid or mitigate his loss by seeking employment by a new employer. This is the obviously correct rule. Some of the earlier English cases and the cases in a few American jurisdictions hold to a very different doctrine,—that of "constructive service." According to this doctrine, the wrongfully discharged employee may remain idle, keeping himself in readiness to perform, and, at the end of the stipulated term of service, may recover wages for the entire period for which he has contracted.[23] Such a doctrine seems unsound, since it squarely violates the important general rule that one must make a reasonable effort to avoid the consequences of any wrong. The doctrine of constructive service is now repudiated in England and in most American jurisdictions.[24]

127. **Mitigation.**—Where an employer is sued for damages under a contract which he has violated by wrongfully discharging his employee, he has a right to set up in mitigation the fact that the employee has secured other employment during the stated period of service, and that he has received compensation for it, or that he could have reduced his damages by taking other employment.[25] In contracts for service, as in all other contracts, any fact that has lessened the damage caused by a breach, may be shown in mitigation.

128. **Function of the Jury.**—In deciding the value of services, the jury is not bound to act in accordance with the statements of any witness, nor is it obliged to average the values stated by different witnesses. The jury may disbelieve or disregard part or all of the testimony

23—Gandell v. Pontigny, (1816) 4 Campb. 375; Strauss v. Meertief, (1879) 64 Ala. 299.

24—Goodman v. Pocock, (1850) 15 Adol. & El. (N. S.) 574; McMullen v. Dickinson Co., (1895) 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511.

25—Benziger v. Miller, (1874) 50 Ala. 206; Heavilon v. Kramer, (1869) 31 Ind. 241.

on this point and act upon the jurors' general knowledge of the value of such services.[26]

It has been held, and, it seems, very properly, that, inasmuch as a jury is not obliged to accept or follow the statements of witnesses, expert or otherwise, as to the value of services, where such value is a matter of common knowledge, but may use the knowledge, common sense and experience of members of the jury, so the plaintiff, in order to lay a foundation for the assessment of compensatory damages in such an action, need not prove the value of such services at all, the jury having a right to decide their value in the absence of testimony on the point, just as it could disregard such testimony if it is given.[27]

CASE ILLUSTRATIONS

1. A contracted to work for B for one year for $120. A worked for B 9½ months, and then failed to complete his contract. A can recover on a *quantum meruit* for the time of his actual service.[28]

2. A and B agreed to cut all timber of certain size upon C's land and to deliver it to C. When A and B had partly performed the contract, C died. D, his personal representative, refused to go on with the contract. A and B sue D for breach of contract. Held, that A and B were under no legal obligation to get other contracts and enter upon the performance of

26—Head v. Hargrave, (1881) 105 U. S. 45, 26 L. ed. 1028. "It was the province of the jury to weigh the testimony of the attorneys as to the value of the services, by reference to their nature, the time occupied in their performance, and other attending circumstances, and by applying to it their own experience and knowledge of the character of such services. To direct them to find the value of the services from the testimony of the experts alone was to say to them that the issue should be determined by the opinions of the attorneys and not by the exercise of their own judgment of the facts on which those opinions were given." The services in question were those of an attorney.

27—Hossler v. Trump, (1900) 62 O. St. 139, 56 N. E. 656, where plaintiff sued for the value of her services as a domestic servant and nurse.

28—Britton v. Turner, (1834) 6 N. H. 481, 26 Am. Dec. 713.

them in order to lessen their damage and thus benefit the defendant. This was not a contract for strictly personal services.[29]

3. Defendants employed plaintiffs to do certain stone work, masonry, and blasting, on three miles of railroad. Before the completion of the work, defendants directed plaintiffs to cease work. "Treating the plaintiffs as having been prevented from executing their part of the contract by the act of the defendants, we think the plaintiffs are entitled to recover, as upon a *quantum meruit*, the value of the services they had performed under it, without reference to the rate of compensation, specified in the contract. They might doubtless have claimed the stipulated compensation, and have introduced the contract as evidence of the defendants' admission of the value of the services. And they might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. In making these claims the plaintiffs would be acting upon the contract as still subsisting and binding; and they might well do so; for it doubtless continued binding on the defendants. But we think the plaintiffs, upon the facts stated in the report of the auditor, were at liberty to consider the contract as having been rescinded from the beginning, and to claim for the services they had performed, without reference to its terms."[30]

29—Sullivan v. McMillan, (1896) 37 Fla. 134, 19 So. 340, 53 Am. St. Rep. 239.

30—Derby v. Johnson, (1848) 21 Vt. 17.

CHAPTER XXXII

Insurance [1]

129. **The Term "Insurance."**—The one word "insurance" is, unfortunately, used to designate contracts widely different in purpose and import. Life insurance and fire insurance are not insurance in the same sense at all; and it is necessary, at the outset, that the student bear in mind that, in this chapter, there are presented subjects which are heterogeneous as to principles of compensation, although homogeneous as to some of the other features.

130. **Life and Accident Insurance.**—Relatively simple are policies of either life insurance or accident insurance. The purpose of these policies is not, strictly speaking, to indemnify the insured or the beneficiary against any loss. Where a life insurance policy is for $1,000, the obligation of the company to pay $1,000 is in no way conditioned upon the result of an inquiry whether the life of the insured was reasonably worth that amount; and where an accident insurance company promises to pay the insured $10 per week as long as he lives, in the event of his losing a hand, the payment must be made.

1. The breadth of this subject and the variety of form assumed by insurance policies, and the addition of various special stipulations in some policies, make it impossible to make so brief a statement as this more than very general. Only general rules are given, of which the operation is often modified by special stipulations. Because of lack of space, no attempt is made to cover the measure of compensation in marine insurance. The purpose of marine insurance, like that of fire insurance, is indemnity against loss. The usual marine insurance contract is a "valued policy," with

whether it can be shown that his hand is financially worth $10 per week to him or not. The reason why no inquiry as to the actual loss of the beneficiary or the insured is tolerated in these cases is simply that neither the life nor the accident policy is a contract of indemnity for loss. Both of these contracts are mere promises to pay certain sums upon the happening of certain events. When the specified event happens, the agreed sum must be paid.[2]

131. **Wrongful Cancellation of Life Insurance Policy by Insurer.**—It sometimes happens that a life insurance company wrongfully cancels a policy during the life of the insured. If this wrong is committed while the age and health of the insured are such as to permit of his procuring insurance with another company, the measure of damages is the reasonable expense immediately incurred by the insured in becoming insured again, plus any increase in premiums he may find it necessary to pay for the probable duration of the remainder of his life or of the premium-paying period.[3] If the insurer wrongfully cancels the policy before changes in the age and health of the insured have increased the premium rate, the measure of damages is the amount of premiums already paid, plus interest thereon.[4] But a different measure of damages from either of these applies in a case wherein the company wrongfully cancels the life policy at a time

principles of compensation somewhat similar to those discussed in connection with fire insurance. The intention of the parties, as evidenced by the language of the policy, determines for what elements the parties intend that compensation shall be made. The interpretation of technical terms having a particular meaning in this connection, such as "perils of the sea," has much to do with determining the extent of liability assumed by the insurer. No adequate introduction to the subject can be given here.

2—Trenton, etc., Co. v. Johnson, (1854) 24 N. J. Law 576; Scott v. Dickson, (1884) 108 Pa. 6, 56 Am. Rep. 192.

3—Braswell v. American Life Ins. Co., (1876) 75 N. Car. 8.

4—Strauss v. Mutual Reserve Fund Life Association, (1900) 126 N. Car. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699.

when the age or health of the insured is such that he cannot procure insurance elsewhere. In such a case, the measure of damages is the amount of the policy, minus the amount of all premiums to be paid to the time of maturity.[5]

132. **Fire Insurance.**—Unlike life insurance, fire insurance is, in its usual form, a mere undertaking to indemnify against loss by fire. On an "open policy," which is the usual form of fire insurance, the question of the amount to be recovered in case of loss is left open and depends upon the extent of the loss, within a limit usually set by the policy. The amount recoverable on an open policy is such an amount as will compensate the insured for his actual loss, whether it be partial or total, limited by the amount of the policy.[6] On a "valued policy" of fire or marine insurance, the amount recoverable in case of total loss is a certain liquidated sum agreed upon by the parties in advance as being, for the purposes of the contract, the value of the property, and the measure of recovery is in no way affected by the fact that the parties have agreed upon an excessive valuation.[7] In the event of a partial loss, the measure of recovery on an open policy is, as in

5—Mutual Reserve Fund Association v. Ferrenbach, (1906) 144 Fed. 342, 75 C. C. A. 304, 7 L. R. A. (N. S.) 1163. In all of these cases the measure of damages varies according to the character and features of the policy.—Id.

6—Fowler v. Old North State Insurance Co., (1876) 74 N. Car. 89; Farmers' Insurance Co. v. Butler, (1882) 38 O. St. 128.

"In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, not the measure of the assured's claim. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled where it is less than the sum insured. So, if the assured has parted with all his interest in the subject insured before the loss happens, he cannot recover, for the reason that the contract is regarded as one for an indemnity, and he has sustained no loss or damage."—Sheldon, J., in Illinois Mutual Fire Insurance Co. v. Andes Insurance Co., (1873) 67 Ill. 362, 16 Am. Rep. 620.

7—See Portsmouth Insurance Co. v. Brazee, (1847) 16 Ohio 82.

the case of a total loss, the amount of the actual loss, not exceeding the amount of the policy;[8] and the measure of recovery, in such a case, on a valued policy, is according to the proportion which the loss bears to the whole property insured.[9]

133. **Insurability of Interest.**—The well known modern policy of the law is against wager contracts, and their validity is denied. Formerly, it was possible for A to effect insurance on the life of B, in the continuance of whose life he had no interest whatever. Such insurance, popularly known as "graveyard insurance," can be no more than a wager, in which A "puts up" the premiums on a bet that B will die soon enough to enable him to realize a profit by the payment to him of the amount of the policy, against which the insurance company stakes its liability to pay such amount in the event of the death of B. An insurance contract of this kind, besides being a wager, encourages A to murder B in order to win the amount of the policy. Such a contract is illegal and unenforceable.[10] The same is true of a fire or marine

8—Liscom v. Boston Mutual Fire Insurance Co., (1845) 9 Metc. (Mass.) 205; Underhill v. Agawan Mutual Fire Insurance Co., (1850) 6 Cush. (Mass.) 440.

9—Natchez Insurance Co. v. Buckner, (1839) 4 How. (Miss.) 63.

10—However, in general, any person may take insurance on his own life in favor of any person that he may wish to name; for he has an insurable interest in his own life.—Langdon v. Union Mutual Life Insurance Co., (1882) 14 Fed. 272; Union Fraternal League v. Walton, (1899) 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; Milner v. Bowman, (1889) 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; Dolan v. Supreme Council, (1908) 152 Mich. 266, 116 N. W. 383, 16 L. R. A. (N. S.) 555, 15 Ann. Cas. 232; Locher v. Kuechenmiester, (1906) 120 Mo. App. 701, 98 S. W. 92; Reed v. Provident Life Assurance Society, (1907) 190 N. Y. 111, 82 N. E. 734; Mutual Benefit Life Insurance Co. v. Cummings, (1913) 66 Ore. 272, 133 Pac. 1169, 47 L. R. A. (N. S.) 252; Brett v. Warnick, (1904) 44 Ore. 511, 75 Pac. 1061, 102 Am. St. Rep. 639; Hill v. United Life Insurance Association, (1893) 154 Pa. 29, 25 Atl. 771, 35 Am. St. Rep. 807.

But statutes sometimes forbid the issuance of life insurance in favor of a beneficiary not interest-

insurance policy in which the parties have agreed upon a clearly and grossly excessive valuation of the property of the insured in order to cover what is in fact a mere wager; and it is true also of a policy on property in which no interest is owned by the insured. The purpose of fire and marine insurance is indemnity, and a person cannot be indemnified against a loss which he cannot possibly sustain, as he would be if he were permitted to enforce insurance taken out on property in which he has no interest. If fire and marine insurance were permitted to be taken out on property in which the insured has no interest, not only would a mere wager thus be permitted, but the insured would be tempted to burn the property or plot to destroy it at sea. One of the most troublesome cases of insurability is that in which the mortgagee of realty takes out fire insurance thereon in order to protect his interest in the property. It would seem that, on principle, he could not recover and retain more than the value of his interest in the property; and the usual rule is, that if the mortgagee has taken insurance on the property to an amount greater than the value of his interest therein, he may recover for the entire loss, as if the whole property were his, but that he must pay to the mortgagor any surplus over and above his own interest.[11] One court, however, lays down a different rule, permitting the mortgagee to recover for the entire loss and to retain the whole sum himself, without any obligation on his part to pay the surplus over the value of his interest to the mortgagor or to permit the insurance company to be subrogated to his rights in the property.[12] Such a rule brings a very strange result, permitting, as it does, the recovery by the mortgagee on the insurance

ed in the life of the insured. See Morgan v. Segenfelter, (1907) 127 Ky. 348, 32 Ky. Law 225, 105 S. W. 476, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343.

11 — Carpenter v. Providence Washington Insurance Co., (1842) 16 Pet. (U. S.) 495, 10 L. ed. 1044.

12—King v. State, etc., Insurance Co., (1851) 7 Cush. (Mass.) 1.

policy and also on the mortgage indebtedness, thus giving the mortgagee, in many instances, twice the amount of the secured indebtedness, besides compensation for loss in the value of the equity of redemption. The mortgagor may effect insurance on his equity of redemption, which is the extent of his interest in the property; or he may, as he often contracts with the mortgagee to do, take insurance on the whole property, principally for the benefit of the mortgagee. In the latter case, the mortgagee has a right to enough of the sum paid for the loss to pay the debt secured, and the mortgagor retains the surplus, if there be any.[13]

CASE ILLUSTRATIONS

1. A has his life insured in favor of B, a woman with whom he is illegally cohabiting and with whom he has gone through no form of marriage. Held, that B could collect the amount of the policy.[14]

2. Fire insurance was carried on bar fixtures. The policy provided that "the company shall not be liable beyond the actual cash value at the time any loss or damage occurs." Between the date of the insurance and the loss by fire, the sale of liquor had been prohibited in the state, so that there was no longer a fair cash value for such fixtures at their location. Held that the value of such movable property "should be ascertained at the nearest fair market for the same, subject to a deduction for the cost of transporting the property, if found necessary and advisable to remove it. * * * There would seem to be no just reason why the value of personal property insured should

13—Cone v. Niagara Fire Insurance Co., (1875) 60 N. Y. 619; Kernochan v. New York Bowery Fire Insurance Co., (1858) 17 N. Y. 428.

14—Mutual Benefit Life Insurance Co. v. Cummings, (1913) 66 Ore. 272, 133 Pac. 1169, 47 L. R. A. (N. S.) 252, McBride, J., dissenting on the ground that such a holding would be against public policy. According to the weight of authority, it would seem that there was excellent ground for this dissent. Where the beneficiary has knowingly lived illegally with insured, it is usually held that she cannot recover as beneficiary of his policy of life insurance. See cases collected in 47 L. R. A. (N. S.) 252 note.

be ascertained at a place where from local causes or peculiar conditions it had become greatly depreciated, when by its removal, if of a kind safely removable, to a reasonably convenient market, its fair value could be procured." [15]

3. In a state wherein a husband had a frechold estate in his wife's property, plaintiff and his wife secured a fire insurance policy on a stock of goods belonging to the wife. Held, that the husband had an insurable interest.[16]

15—Prussian National Insurance Co. v. Lawrence, (1915) 221 Fed. 931, L. R. A. 1915 E 489.

16—Gleason v. Prudential Fire Ins. Co., (1912) 127 Tenn. 8, 151 S. W. 1030.

CHAPTER XXXIII

Indemnity

134. **In General.**—One party enters into a contract to indemnify another against a certain possible loss or a liability to pay or assume a certain debt which the other is to incur. The measure of damages for breach of such a contract is the amount of such loss, liability, or debt, together with compensation for such other losses as occur as natural and probable results of the breach, such as expenses and costs.[1] The fact of actual loss is essential to the maintenance of an action on a contract to indemnify against actual loss, damage being the gist of the action.[2]

135. **Kinds of Indemnity Contracts, and the Maturity of Rights Thereunder.**—In a case wherein one party has contracted to indemnify the other party not only against actual loss, but against liability, the payment of the amount of the liability by the other party is not a prerequisite to the right of the other party to maintain his action for breach of the contract; for it is sufficient that the mere liability is, in itself, the kind of event indemnified against.[3]

Where one binds oneself to save another from financial damage, it is, according to the usual view, unnecessary

1—Wetmore v. Green, (1831) 11 Pick. (Mass.) 462.

2—Kennedy v. Fidelity & Casualty Co., (1907) 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658; Chace v. Hinman, (1832) 8 Wend. (N. Y.) 452, 24 Am. Dec. 39.

3—Furnas v. Durgin, (1876) 119 Mass. 500, 20 Am. Rep. 341; Valentine v. Wheeler, (1877) 122 Mass. 566, 23 Am. Rep. 404; Bolles v. Beach, (1850) 22 N. J. Law 680, 53 Am. Dec. 263.

that the obligee shall have paid the obligation in cash before he can recover the amount thereof of the obligor, it being sufficient if he has given a promissory note or other negotiable paper in settlement of the claim. So, where the defendant has issued to the plaintiff a policy of indemnity against "loss from the liability imposed by law upon the assured from damages on account of bodily injuries or death accidentally suffered while this policy is in force, by an employee or employees of the assured," and an employee is killed, and his administrator brings action against the plaintiff, procuring a judgment, and plaintiff borrows money to pay the judgment and actually pays it, the plaintiff is entitled to recover against the defendant, whether the plaintiff has paid back the borrowed money or not, as the loss to the plaintiff has already become complete, regardless of the question how he got the money with which to pay.[4] So, where a grantee in a deed agrees to pay the amount of a mortgage as part of the consideration and fails to do so, and the grantor is obliged to discharge the mortgage, which he does by giving new security, the grantor is entitled to be indemnified in the full amount of the mortgage.[5] Likewise, where the obligee has given his note in direct payment of a judgment which the obligor has indemnified him against, the liability of the obligor is fixed.[6] Payment by negotiable paper is considered as being actual payment within the meaning of an indemnity contract.[7] Damages in excess of the actual loss to plaintiff are not recoverable.[8]

4—West Riverside Coal Co. v. Maryland Casualty Co., (1912) 151 Ia. 161, 135 N. W. 414, 48 L. R. A. (N. S.) 195. See L. R. A. note on this case.

5—Bolles v. Beach, (1850) 22 N. J. Law 680, 53 Am. Dec. 263.

6—Seattle & S. F. Ry., etc., Co. v. Maryland Casualty Co., (1908) 50 Wash. 44, 96 Pac. 509, 18 L. R. A. (N. S.) 121, 126 Am. St. Rep. 886. See L. R. A. note to same.

7—Ralston v. Wood, (1853) 15 Ill. 159, 58 Am. Dec. 604; Pasewalk v. Bollman, (1890) 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399.

8—Valentine v. Wheeler, (1877) 122 Mass. 566, 23 Am. Rep. 404.

CASE ILLUSTRATIONS

1. A mortgages land to B, giving a bond that he will discharge all incumbrances. B enters to foreclose, but is evicted by a prior mortgagee. Held, that B can recover the amount of prior mortgagee's judgment and costs, with interest.[9]

2. An execution creditor agrees to indemnify a purchaser against loss. Held that, where a purchaser later has to defend title, he may recover from the execution creditor the cost of such defense.[10]

3. A agrees to indemnify and save B harmless against his liability as maker of a certain note for $500 and to pay certain notes already due. A breaks his contract. B can recover the amount of the note and interest thereon, although he has not yet paid the note. Costs, however, could not be recovered unless actually paid.[11]

4. A contracts to indemnify the sureties on his bond as postmaster against all damages, costs, and charges which they might incur on account of their liability. Held, that the sureties, in order to recover against their principal, were bound to prove actual damage. "Although a judgment had been recovered against them, there was no evidence that they had paid anything, or that they were put to any expense in defending the suit." [12]

9—Wetmore v. Green, (1831) 11 Pick. (Mass.) 462.

10—Cassidy v. Taylor, etc., Co. (1903) 79 N. Y. S. 595, 79 App. Div. 242.

11—Churchill v. Hunt, (1846) 3 Denio (N. Y.) 321.

12—Jeffers v. Johnson, (1847) 21 N. J. Law 73.

CHAPTER XXXIV

Agency

136. **In General.**—The rules governing the measure of damages for the breach of a contract in which agency is involved, are not, in the principal features, different from the general rules of the law of contracts. The intention of the contracting parties governs. The seemingly unusual and far-reaching rules governing the conduct of the agent because of the fiduciary character of his work, are simply in line with what the parties to a contract of agency would express if they made express statement of all the stipulations they really intend. The fiduciary nature of the relation is implied, together with all of the propositions corollary to it.

137. **Liability of Agent to Principal.**—An agent is acting for his principal, and not for himself. Good faith and honest dealing require that he pay over to his principal all profits made by him in the course of the business transacted by him for his principal. If an agent secretly makes profits on his principal's transaction, the principal may sue the agent and recover all such profits.[1]

An agent must show reasonable care, skill, and judgment, in the exercise of his duties for his principal, and is liable in damages for a failure in this regard.[2] He must

1—McKinley v. Williams, (1896) 74 Fed. 94, 20 C. C. A. 312; Gower v. Andrew, (1881) 59 Calif. 119, 43 Am. Rep. 242; Davis v. Hamlin, (1883) 108 Ill. 39, 48 Am. Rep. 541; Bassett v. Rogers, (1894) 162 Mass. 47, 37 N. E. 772; Hegenmyer v. Marks, (1887) 37 Minn. 6, 32 N. W. 785, 5 Am. St. Rep. 808; Crump v. Ingersoll, (1890) 44 Minn. 84, 46 N. W. 141; Bent v. Priest, (1885) 86 Mo. 475; Jansen v. Williams, (1893) 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207.

2—Whitney v. Abbott, (1906) 191 Mass. 59, 77 N. E. 524; We-

not violate the express or implied conditions of his contract of agency, and is liable to his principal for any such violation.[3]

Where an attorney breaks his contract with his client by settling a claim in favor of the client at a less sum than that at which he is authorized to settle, the attorney's liability does not necessarily extend to the total difference between the amount he has actually collected and paid to his client and the amount originally claimed by the client; for the true measure of damages here, as elsewhere, is the amount of loss actually sustained by the plaintiff, which would here be the difference between the amount actually collected and paid over to the client and the amount which the client would, with reasonable certainty, have been able to collect but for the wrongful act of the attorney.[4]

If the agent wilfully neglects to keep true accounts of the business transacted for his principal or fails to render accounts, he forfeits his right to compensation.[5]

If an agent causes his principal a loss by doing things beyond his actual authority and at the same time within his apparent authority, so that his master is bound by his acts, he is liable to his principal for all losses proximately resulting from the wrong.[6]

An agent is liable to his principal for all losses proximately resulting from his negligence.[7]

leetka Light & Water Co. v. Burleson, (1914) 42 Okla. 748, 142 Pac. 1029.

3—Ashley v. Root, (1862) 4 Allen (Mass.) 504.

4—Vooth v. McEachen, (1905) 181 N. Y. 28, 73 N. E. 488, 2 Ann. Cas. 601.

5—Sipley v. Stickney, (1906) 190 Mass. 43, 76 N. E. 226, 5 L. R. A. (N. S.) 469, 112 Am. St. Rep. 309, 5 Ann. Cas. 611; Little v. Phipps, (1911) 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046; Weleetka Light & Water Co. v. Burleson, (1914) 42 Okla. 748, 142 Pac. 1029.

6—Bell v. Cunningham, (1830) 3 Pet. (U. S.) 69, 7 L. ed. 606; Birdsell Mfg. Co. v. Brown, (1893) 96 Mich. 213, 55 N. W. 801.

7—Plumb v. Campbell, (1888) 129 Ill. 101, 18 N. E. 790; Allen v. Suydam, (1838) 20 Wend. (N. Y.) 321, 32 Am. Dec. 555; Meadville First National Bank v. New

138. **Liability of Principal to Agent.**—The principal must of course pay his agent the commission or other compensation agreed upon, when the agent has done that which he has agreed to do.[8] If an agent ignores his obligation to his principal, pocketing secret profits on a transaction for his principal, or if he materially violates his contract of agency, he cannot collect a commission for his services in bringing about the transaction.[9]

The principal must reimburse his agent for his reasonable and necessary expenditures made within the scope of his authority, in the performance of his task, as these are within the contemplation of the parties at the time of entering into the contract, unless otherwise stipulated.[10]

In accordance with a usage among factors and their principals, a factor may sell at the best price obtainable property purchased by him for his principal and charge the loss to his principal.[11]

If the principal wrongfully terminates the agency by discharging the agent, the case is governed by the general rules determining the measure of damages for breach of contract.[12]

139. **Liability of Agent to Third Person.**—Where an agent does not exceed his authority or undertake any

York Fourth National Bank, (1879) 77 N. Y. 320, 33 Am. Rep. 618.

8—United States Mortgage Co. v. Henderson, (1886) 111 Ind. 24, 12 N. E. 88; Mangum v. Ball, (1870) 43 Miss. 288, 5 Am. Rep. 488.

9—Jansen v. Williams, (1893) 36 Neb. 869, 55 N. W. 279, 20 L. R. A. 207.

10—Rosenstock v. Tormey, (1869) 32 Md. 169, 3 Am. Rep. 125; Beckwith v. Sibley, (1831) 11 Pick. (Mass.) 482.

"The agent's right to be repaid moneys he has expended for his principal pursuant to his authority rests upon a clear legal ground; they are paid at the principal's request and the law implies a duty and promise to refund."—Suth. Dam. (4th Ed.) § 789.

11—Suth. Dam. (4th ed.) § 790, citing Couturie v. Roensch, (Tex. Civ. App. 1911) 134 S. W. 413.

12—2 C. J. 791; Richardson v. Eagle Machine Works, (1881) 78 Ind. 422, 41 Am. Rep. 584; Hunt

acts for himself in connection with his principal's business, questions as to liability of the agent to third persons seldom arise. But if the agent exceed his authority and make a contract unauthorized by his principal, a different situation arises. The third person has dealt with the agent upon the implied agreement that the agent is authorized to do the act which he undertakes to do. There is, on the part of the agent, an implied warranty that he has such authority, and he is liable on such warranty for all losses accruing as natural and probable results of the breach, and is, on principle, not liable on the contract he has made ostensibly for a principal.[13] A less satisfactory and less logical holding, found in a few states, is to the effect that the agent who makes an unauthorized contract is liable upon it as principal.[14] This is utterly illogical, substituting a new contract for the one made by parties. It may even happen that a contract with the principal would have been of no value, because of his insolvency, perhaps unknown at the time of the making of the contract, and that a similar contract with the agent would be highly valuable. In such a case, under this anomalous rule, the third person would receive not merely what he had lost by reason of the breach of warranty, but a right of much more financial value.

CASE ILLUSTRATIONS

1. Plaintiff agrees to convey to the order of defendant, a broker, certain property at a certain price, and to pay a cer-

v. Crane, (1857) 33 Miss. 669, 69 Am. Dec. 381; Ream v. Watkins, (1858), 27 Mo. 516, 72 Am. Dec. 283; King v. Steiren, (1862) 44 Pa. St. 99, 84 Am. Dec. 419.

13—Jefts v. York, (1849) 4 Cush. (Mass.) 371, 50 Am. Dec. 791; Bartlett v. Tucker, (1870) 104 Mass. 336, 6 Am. Rep. 240; Farmers' Co-operative Trust Co. v. Floyd, (1890) 47 O. St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846; Haupt v. Vint, (1911) 68 W. Va. 657, 70 S. E. 702, 34 L. R. A. (N. S.) 518.

14—So held in Alabama, Indiana, Louisiana, South Carolina, and Vermont. See Gillaspie v. Wesson, (1838) 7 Port. (Ala.) 454, 31 Am. Dec. 715; and cases cited in 2 C. 808.

tain commission upon defendant's selling it. Defendant succeeds in getting a much larger amount for the property and keeps the difference. Held, that defendant must pay over to plaintiff the entire sum collected as purchase money.[15]

2. A makes a conditional sale of a gasoline engine to B, with the provision that title shall not pass until the purchase money has been paid in full. B receives the engine, but refuses to sign the contract. A employs C, an attorney at law, and instructs him to get B to sign the contract, or to take such legal action as C may deem proper, but not, under any circumstances, to do anything that will lose A's title to the engine. C negligently brings an action against B for the price of the engine, thus electing to pass title to B, whereby A loses title. Held, that A can maintain an action against C, and that his measure of damages is the market value of the engine.[16]

3. A, principal, directs B, his agent, to foreclose a certain mortgage and to purchase the mortgaged goods at the foreclosure sale, unless other parties should bid $250. B permitted the goods to sell for $12. Held, that A can recover of B the difference between the fair cash value of the goods and the price for which they sold.[17]

4. A, agent, in accordance with authority given him by B, his principal, buys insurance on B's property, and pays the premium. A can recover the amount of the premium from B.[18]

15—Bassett v. Rogers, (1894) 162 Mass. 47, 37 N. E. 772.

16—Whitney v. Abbott, (1906) 191 Mass. 59, 77 N. E. 524.

17—Dazey v. Roleau, (1903) 111 Ill. App. 367.

18—Rochester v. Levering, (1886) 104 Ind. 562, 4 N. E. 203, which holds that this is true, although the policy is voidable because A is agent of the insurance company.

CHAPTER XXXV

Partnership

140. **Breach of Partnership Articles by Refusal to Begin Business or by Wrongful Dissolution.**—Where one party contracts to form a partnership to engage in a certain business for a definite period, and breaks the agreement by refusing to permit the business to be launched or by wrongful dissolution after business has been begun, the measure of damages includes loss of profits that would have been earned during such period. Loss of profits is a damage contemplated by the parties and resulting proximately from the breach, and recovery for such loss is always possible when it is practicable to prove profits with reasonable certainty.[1] For the purpose of proving prospective profits, evidence of past profits is admissible.[2] Likewise, the business condition and growth of the community in which the business is located may be shown and the plaintiff's ability and skill, as bearing upon the amount of prospective profits.[3]

Expenditures incurred by the plaintiff, in good faith, for the benefit of the partnership, may be recovered on special pleading and proof. If the defendant, at the time of a wrongful dissolution, owes his partner, the plaintiff, a certain sum, this may be recovered with interest from the time of such breach.[4]

Where one partner has paid the other a premium, on agreement that the partnership is to last for five years,

1—Bagley v. Smith, (1853) 10 N. Y. 489, 61 Am. Dec. 756.

2—Bagley v. Smith, supra.

3—Suth. Dam., 4th ed., § 68, citing Ramsay v. Meade, (1906) 37 Colo. 465, 86 Pac. 1018.

4—See Hill v. Palmer, (1882) 56 Wis. 123, 14 N. W. 20.

and the other wrongfully dissolves the partnership at the end of one year, it is held that four-fifths of the premium must be returned.[5] It would seem more in accord with general rules of the law of damages to say that the wronged partner is entitled to be reimbursed for his actual loss caused by the dissolution, which amounts to the value of the partnership to him.[6]

141. **Liquidation of Damages for Dissolution.**—It is manifestly impossible to calculate with any accuracy the amount of damage suffered by one partner as a result of wrongful dissolution of the partnership by another party. For this reason, it is proper for the parties to a partnership agreement to fix liquidated damages for wrongful dissolution.[7]

142. **Transactions Concealed by One Partner from Another.**—Where one partner conceals from another the fact that he is offered a large sum for the partnership property, and induces the other partner to accept less than his share of the proceeds, the other has a right not simply to his share of the actual value of the property, but to his share of the amount actually received. The partners are in a relation of mutual confidence, and the concealment of relevant facts in such a case is fraud.[8]

CASE ILLUSTRATIONS

1. A, B, and C entered into a partnership agreement to do business as a firm for four years and one month. A and B, while C was traveling on business of the firm, wrongfully dissolved the partnership and formed a new firm of their own. Held, that C can recover of A and B future profits, and that,

5—Corcoran v. Sumption, (1900) 79 Minn. 108, 81 N. W. 761, 79 Am. St. Rep. 428.

6—McCollum v. Carlucci, (1903) 206 Pa. 312, 55 Atl. 979, 98 Am. St. Rep. 780.

7—Yatsuyanagi v. Shimamura, (1910) 59 Wash. 24, 109 Pac. 282.

8—Finn v. Young, (1908) 50 Wash. 543, 97 Pac. 739.

for the purpose of estimating such profits, evidence of past profits of the firm is admissible.[9]

2. A fraudulently obtained the consent of B, his partner, to the sale of their business, having falsely represented that the price to be received was $21,000, when actually it was $35,000. A then paid B, as his portion of the proceeds, only $10,500. Held, that B has a right to his one-half share in the proceeds, or $17,500, and that he can recover of A $7,000.[10]

9—Bagley v. Smith, (1853) 10 N. Y. 489, 61 Am. Dec. 756.

10—Finn v. Young, (1908) 50 Wash. 543, 97 Pac. 741.

CHAPTER XXXVI

Carriers

141. **Introductory.**—The liability of a common carrier, independently of contract, is grounded in his common law duty. For this reason, where a common carrier commits a wrong which is a violation of his contract of carriage and at the same time a violation of his common law duty, he may be sued in either contract or tort. On sound principle, the mere form of the action will not make any difference as to the measure of damages. Substance and the nature of the plaintiff's right, and not the form of action elected, determine the measure of damages. As there is a contract relation between carrier and shipper or passenger, the question of the naturalness and probability of injurious results accruing from a breach of the contract, is pertinent; and the question whether the loss is a proximate result of the defendant's wrong, must be settled, as in any other case. Some injurious results of the carrier's breach of common law duty or of contract cannot be recovered for, because they were not within the contemplation of the parties at the time of making the contract.

Questions as to the contemplation of the parties, appear in cases of carriers of goods, almost to the exclusion of questions of proximity, making these cases resemble closely cases of ordinary contract, especially cases of sales. The common law liability of the carrier for loss of or damage to goods carried, is absolute, with two exceptions: first, losses occasioned by the act of God; and, second, those caused by the act of the public enemy. In determining the extent of the carrier's liability in a par-

ticular case, we must have, as a preliminary, always to decide whether and to what extent the parties have modified the common law obligation and liability by special contract, if they have made one. They may have expressly eliminated from the purview of the contract any liability of the carrier for certain possible losses, in which event these losses cannot be recovered for; or they may have so contracted as to add to the possible consequences for which the carrier will be held liable.

In cases involving the carrying of passengers, common law duties and liabilities of the carrier are of much importance, while there is so little of the making of actual express contracts in regard to the carriage of passengers, that the intention of the parties does not play so large a part in stating, limiting, or extending liability, as it plays in cases involving the carriage of goods. The cases involving carriers of passengers are ordinarily actions for wrongful refusal to carry the plaintiff, wrongful ejection from a train, unreasonable delay, wrongful treatment while a passenger, or for personal injury suffered while being carried. Most of the elements involved in these cases are elements of tort; and the question of proximity of injurious result is more important and more frequently raised than the question of naturalness and probability.

142. **Failure of Shipper to Deliver Goods for Shipment.** —Where a shipper fails to deliver goods to the carrier for shipment, after contracting with the carrier for their carriage, the carrier may be damaged simply to the extent of his loss of profit on the transaction; or, to express it in another way, his damage may be the difference between the contract price and the cost of carrying the goods. But it sometimes happens, as in a case wherein the contract of carriage is large enough to necessitate the use of a whole ship, that the carrier can get another cargo to take the place of that of the shipper; and, where he has done this or might have done it by the exercise of

reasonable diligence, the amount which he has earned or might have earned on a new cargo, may be deducted from his damages. There are, however, some cases of failure of the shipper to deliver goods to the carrier, in which the measure of damages is the contract price of the carriage. Such a case is one wherein a ship is obliged to sail on a certain day in order to fulfill contracts with other shippers, all costs of the voyage being fixed, and it being impossible to get other goods to fill the deficiency in the cargo. The carrier's loss, in such a case, is the whole contract price.

The damages assessed against the shipper, in these cases, vary greatly, according to the facts and the nature of the case. "The measure of damages is full indemnity for all they have lost through the default of the shippers."[1]

143. **Compensation of the Carrier of Goods.**—The compensation of the carrier is usually fixed by contract or by statute. In the absence of any contract stipulation or statutory regulation, the carrier is entitled to reasonable compensation for his services.[2]

144. **Failure of Carrier to Receive and Carry Goods.**—Where the carrier wrongfully refuses or fails to carry goods, the measure of damages ordinarily is the difference between what would have been the value of the goods

1—For an excellent discussion of this phase of the subject, see Bailey v. Damon, (1854) 3 Gray (Mass.) 92.

2—"Without regard to the rights of the shipper and carrier, as they may be under special contracts, the agreement which the law imports into every bill of lading which does not stipulate the price to be paid for the service is, that the compensation shall be reasonable, and such as is customarily charged others for like service under like conditions."—Louisville, Evansville, etc., R. Co. v. Wilson, (1889) 119 Ind. 352, 21 N. E. 341, 4 L. R. A. 244.

See also: Johnson v. Pensacola, etc., R. Co., (1878) 16 Fla. 623, 26 Am. Rep. 731; Gray v. Missouri River Packet Co., (1876) 64 Mo. 47.

at destination when, if carried, they should have arrived, and their value at such time at the starting-point, plus the necessary expense of storage and deterioration, and the like, caused by its detention, minus the reasonable cost of transportation.[3]

145. **Loss or Destruction of Goods While in the Hands of the Carrier.**—Ordinarily, the measure of damages for the complete loss or destruction of goods by the carrier is the value of the goods at the time and place set for delivery to the consignee.[4] The loss of such value is either the total damage or an item of damage in every case of this kind. Such a loss is a direct and necessary result of the wrong of the carrier; but there are various other and consequential results that accrue in many of these cases. A loss directly resulting from the carrier's wrong is always taken to have been within the contemplation of the parties;[5] but consequential damages, such as loss of profits or deterioration of raw material in the hands of the consignee for manufacture, may or may not have been contemplated. Special pleading and proof that a consequential result is natural and probable is essential to a recovery of damages therefor.

146. **Delay in the Carriage of Goods.**—Where the carrier delivers the goods late, the shipper is ordinarily entitled to recover only the excess of the value of the goods, at what would have been the proper time and place of delivery under the contract, over the value of the goods at the time and place of the carrier's breach of contract, plus interest on their value or compensation for the

3—Substantially the rule given by Skinner, J., in Galena, etc., R. Co. v. Rae, (1857) 18 Ill. 488, 68 Am. Dec. 574. See also Cobb, etc., Co. v. Illinois Central R. Co., (1874) 38 Ia. 601.

4—Spring v. Haskell, (1862) 4 Allen (Mass.) 112; Watkinson v. Laughton, (1811) 8 Johns. (N. Y.) 213.

5—McGregor v. Kilgore, (1834) 6 Ohio 358, 27 Am. Dec. 260. See also Sangamon, etc., R. Co. v. Henry, (1852) 14 Ill. 156.

loss of their use during the time of delay.[6] To this may be added other elements of damage proper to be considered only if within the contemplation of the parties, such as loss of profits [7] and the necessary payment by the shipper of liquidated damages under a contract with the consignee.[8]

"In the case of property like films intended for use as distinguished from sale or some other purpose, the ordinary damages would be the loss of rental value caused by the delay and perhaps certain incidental expenses if incurred." [9]

If the carrier accepts the goods with knowledge of circumstances such as would cause the shipper to suffer unusual damage in the event of delay, special damages may be assessed for delay, upon special pleading and proof; but, if the carrier is not made aware of such circumstances, the shipper is restricted to damages in such an amount as would compensate for the loss that would ordinarily flow from the delay. It has been held that, in order that a shipper of films may hold an express company liable for special profits to be made in the motion picture business, which are lost because of the company's delay, he should have notified the carrier of the particular circumstances making important their delivery by a certain day, and that the carrier should have been informed that plaintiff had made certain plans based upon the arrival of the films at a certain time, and that the non-

6—Cutting v. Grand Trunk Ry. Co., (1866) 13 Allen (Mass.) 381.

7—Devereux v. Buckley, (1877) 34 O. St. 16, 32 Am. Rep. 342. But no recovery can be had for loss of profits or other consequential loss, unless it is shown to have been within the contemplation of the parties. Hadley v. Baxendale, (1854) 9 Exch. 341, 5 E. R. C. 502; Horne v. Midland Ry., (1872) L. R. 7 C. P. 583.

8—Illinois Central R. Co. v. Southern Seating & Cabinet Co., (1900) 104 Tenn. 568, 58 S. W. 303.

9—Chapman v. Fargo, (1918) 223 N. Y. 32, 119 N. E. 76, Ann. Cas. 1918 E 1054, citing: Suth. Dam. § 905; Hutch. Car. § 1373. See Ann. Cas. note on above case, "Measure of Damages for Carrier's Delay in Transporting Property Intended for Exhibition Purposes."

arrival of the films would probably cause certain damage.[10] Mere delivery to the carrier of motion picture films, with notice to rush, does not suffice to put the carrier on notice that the films are those of a big "feature," for which unusually high prices of admission will be charged, and which will draw unusually large crowds, so as to hold the carrier for the large loss of profits to the shipper.[11]

A carrier is under no general obligation to deliver goods instantly or with the very greatest speed physically possible. He is allowed a reasonable period in which to make delivery, and only upon the expiration of such reasonable period can damages for delay begin to be computed.[12]

For delay of the carrier in furnishing facilities for shipment of goods, the shipper may recover damages for the expense of care and keeping, and the depreciation in value occurring either because of a falling market or because of deterioration in quality during the period of unreasonable delay.[13]

147. **Mitigation of Damages.**—Here as elsewhere, facts tending to lessen plaintiff's loss may be shown in mitigation of damages. For instance, although acceptance by the owner of goods negligently injured by the carrier does not deprive him of his right of action, it goes in mitigation of damages.[14]

148. **Failure or Refusal to Carry Passenger.**—A carrier must respond in damages for a failure or refusal to carry a person whom he has agreed to accept as a

10—Chapman v. Fargo, (1918) 223 N. Y. 32, 119 N. E. 76, L. R. A. 1918 F 1049.

11—Chapman v. Fargo, supra.

12—Sherman v. Hudson River R. Co., (1876) 64 N. Y. 254.

13—Ayres v. Chicago & Northwestern Ry. Co., (1888) 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226.

14—Bowman v. Teall, (1840) 23 Wend. (N. Y.) 306, 35 Am. Dec. 562.

passenger or a person who offers himself as a passenger, as the carrier must fulfill his contracts to carry passengers and must abide by the common law, which compels him to accept as passengers all proper persons offering themselves for transportation. Independently of the question of contractual liability, a carrier wrongfully refusing to carry a passenger or wrongfully discharging him from its conveyance and thus not completing the carriage, commits a tort;[15] and it follows that all proximate injurious results may be recovered for, whether they were contemplated by the parties or not.[16] But remote damages are not recoverable.[17] The carrier is liable, on his contract of carriage, for all elements of damage that may fairly be said to have been within the contemplation of the parties at the time of the making of the contract.

149. **Delay in Carriage of Passenger.**—The measure of damages for negligent delay in the transportation of a passenger varies greatly according to the nature of the case. The element of damage normally accruing as a proximate result of the delay is loss of time.[18] This is a direct result of the carrier's delay, always sure to happen. Other results stand on a different footing, as they are not the normal or usual results and so cannot be recovered for in the absence of special pleading and proof.[19] Here, as elsewhere, remote damages are excluded.[20]

150. **Wrongful Refusal to Furnish Accommodations to Person Wishing to Become Passenger.**—Where a com-

15—Nevin v. Pullman Palace Car Co., (1883) 106 Ill. 222.

16—Hobbs v. London & Southwestern Ry., (1875) 10 Q. B. 111; Brown v. Chicago, Milwaukee & St. Paul Ry. Co., (1882) 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41.

17—Hobbs v. London & Southwestern Ry., supra; Baltimore & Ohio R. Co. v. Carr, (1889) 71 Md. 135, 17 Atl. 1052.

18—Cooley v. Pennsylvania R. Co., (1903) 81 N. Y. Supp. 692, 40 Misc. 239.

19—Cooley v. Pennsylvania R. Co., supra.

20—Turner v. Great Northern Ry. Co., (1896) 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883.

mon carrier wrongfully refuses accommodations to a passenger, it is liable for such refusal and for any accompanying vexation, indignity, or disgrace.[21] Verdicts for large amounts have been sustained in such cases.[22]

But damages cannot be recovered for the rightful exclusion of a passenger from a car. Where a sleeping-car company sells a passenger a ticket for a berth in one of its cars, and later, finding that he has a loathsome disease, excludes him from its car, the measure of damages is the sum paid for the ticket, with interest thereon.[23]

151. **Wrongful Expulsion, and Personal Injuries to Passengers.**—The wrongful expulsion of a passenger may be considered as either a breach of contract or a tort. Numerous recoverable elements of damage are possible in such cases. Among the possible elements are the passenger's loss of his transportation, loss of time, humiliation, indignity, mental suffering, and any accompanying personal injury.[24] The carrier is liable for all injuries proximately resulting from wrongful expulsion,[25] but is not liable for remote results, for which passengers often try to recover.[26]

The measure of damages for the personal injury of a passenger through the negligence of the carrier, is the same as in any other case of personal injury. The carrier, although not an insurer of the safety of a passenger,

21—Patterson v. Old Dominion S. S. Co., (1906) 140 N. Car. 412, 53 S. E. 224, 5 L. R. A. (N. S.) 1012.

22—Indianapolis, etc., Ry. Co. v. Rinard, (1874) 46 Ind. 293.

23—Pullman Car Co. v. Krauss, (1906) 145 Ala. 395, 40 So. 398, 4 L. R. A. (N. S.) 103, 8 Ann. Cas. 218.

24—See Brown v. Chicago, Milwaukee & St. Paul Ry. Co., (1882) 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41.

25—Carsten v. Northern Pacific R. Co., (1890) 44 Minn. 454, 47 N. W. 49, 9 L. R. A. 688, 20 Am. St. Rep. 589; O'Rourke v. Citizens' Street Ry. Co., (1899) 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639.

26—Carsten v. Northern Pacific R. Co., supra.

is under a duty to exercise the highest degree of care; and many cases involving personal injury arise between passenger and carrier.[27]

152. **Misdirection of Passenger.**—Where a carrier misdirects a passenger as to his route over its lines, it is liable for the proximate and certain results of such misdirection. The misdirected passenger may recover for injuries suffered by reason of having to make a greater number of changes of trains than would have been required if the proper route had been taken.[28]

153. **Liability for Baggage.**—The carrier does not impliedly contract to carry immense sums of money or property of great value with each passenger and keep it safe; and so, where sixteen thousand dollars' worth of bonds were stolen from the person of a passenger, the carrier cannot be held for their value, but is liable only for the value of such property as would ordinarily be carried by a passenger.[29]

CASE ILLUSTRATIONS

1. A places goods in the hands of B, a common carrier, to transport by ship from New York to San Francisco. The goods are lost in transit. The measure of damages "is the market value of the goods at the port of delivery; for, if the contract had been fulfilled, the shipper would have realized that sum, and that sum only." [30]

2. A still-worm, to be used by plaintiff in the manufacture of turpentine, was shipped over defendant's road. Through an error of defendant, it was carried to a station other than its destination, and was delivered to another party, eight miles in

27—See Weir v. Union Ry. Co., (1907) 188 N. Y. 416, 81 N. E. 168.

28—Robertson v. Louisville & N. R. Co., (1904) 142 Ala. 216, 37 So. 831; St. Louis S. W. Ry. Co. v. White, (1905) 99 Tex. 359, 89 S. W. 746, 2 L. R. A. (N. S.) 110.

29—Weeks v. New York, etc., R. Co., (1878) 72 N. Y. 50, 28 Am. Rep. 104.

30—Ringgold v. Haven, (1850) 1 Calif. 108.

the country. Plaintiffs, after various efforts and much expense, found the worm six weeks later. Held, that plaintiffs may recover for the loss of crude turpentine, which, by reason of the delay, overflowed and was lost, and for the necessary expenses incurred in searching for the worm. The purpose of such search was to avoid damage.[31]

3. Plaintiffs' machinery, while in the hands of defendant carrier was delayed for three months. Plaintiffs spent a large sum in looking for the machinery, and were damaged much in the loss of use of it, by stoppage of their business, and the idleness of twenty-five workmen for three months. Held, that, unless specially pleaded, the elements of damage other than loss of use of the machinery could not be recovered for.[32]

4. Defendant sold plaintiff a ticket from New York to San Francisco, via Nicaragua. Defendant's agent had represented to plaintiff that the Nicaragua route was healthful. No vessel of defendant arriving in Nicaragua to take plaintiff on to San Francisco, plaintiff waited for a month, unsuccessfully trying to get passage for the rest of the journey. In this he failed, and, owing to the unhealthful condition of the country, became ill. He finally returned to New York. "The time the plaintiff lost by reason of his detention on the isthmus; his expenses there, and of his return to New York; the time he lost by reason of his sickness after he returned home; and the expense of such sickness, so far as the same were occasioned by the defendant's negligence or breach of duty, were legitimate and legal damages which the plaintiff was entitled to recover."[33]

31—Savannah, etc., Ry. Co. v. Pritchard, (1887) 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

32—Priestly v. Northern Indiana, etc., R. Co., (1861) 26 Ill. 205, 79 Am. Dec. 369.

33—Williams v. Vanderbilt, (1863) 28 N. Y. 217, 84 Am. Dec. 333.

CHAPTER XXXVII

Telegraph and Telephone Companies

154. **Telegraph Companies' Liability in General.**—Although telegraph companies are not common carriers, except as made so by statute,[1] their legal duty to accept and convey, with reasonable care, the messages of all comers, resembles the common law duty of the common carrier. The telegraph company does not have to respond in damages for elements of loss that were not within the contemplation of the parties at the time of making the contract, any more than would any other type of contractor.

If the despatch shows on its face that it is a business despatch and shows the nature of the business, the company is held to contemplate such loss as would naturally result from its failure to transmit the despatch promptly and correctly, but the company would no more be liable here for mental suffering than in any other case of commercial contract, because such suffering is not usually contemplated as a natural and probable result of a breach of a mere business contract. Error or delay in the transmission of a non-commercial message is often capable of producing loss other than pecuniary, the nature and extent of probable losses depending upon the nature of the contents. Messages concerning sickness or death of relatives or friends are, of themselves, sufficient notice to the company that the sender or sendee may experience mental suffering as the result of a failure to transmit correctly and deliver promptly; and so, where there is a breach of

1—See Chapter XIII, "Conflicts of Laws."

contract to convey such a message, damages for mental suffering are frequently allowed.[2]

Where a telegraph company fails to deliver a message announcing that a certain stock of goods can be bought at a bargain, the sendee cannot recover for the loss of the bargain. Such loss is remote and speculative. Either the sender or the sendee might have decided later not to make a contract, even if the telegram had been delivered.[3]

155. **Liability for Cipher Message.**—Some courts hold that, where a message is in cipher, the telegraph company, as it is not acquainted with the nature of the message and not aware of the kind or extent of the consequences that may ensue in the event of error or delay, is liable, in case of error or delay, only in the amount paid for the sending of the message.[4] Other courts take what seems a more reasonable view, considering the exigencies and well known customs of modern business,—that the telegraph company must respond in damages for losses proximately resulting from violation of a contract to transmit and deliver a cipher message clearly relating to important business.[5]

2—See Chapter XXI, "Mental Suffering."

3—Western Union Tel. Co. v. Caldwell, (Ark. 1918) 202 S. W. 232, L. R. A. 1918 D 121; Fulkerson v. Western Union Tel. Co., (1913) 110 Ark. 144, 161 S. W. 168, Ann. Cas. 1915 D 221, 5 N. C. C. A. 158; Hall v. Western Union Tel. Co., (1910) 59 Fla. 275, 51 So. 819, 27 L. R. A. (N. S.) 639; Western U. Tel. Co. v. Watson, (1894) 94 Ga. 202, 21 S. E. 457, 47 Am. St. Rep. 151; Shawnee Mill Co. v. Postal Tel.-Cable Co., (1917) 101 Kan. 307, 166 Pac. 493, L. R. A. 1917 F 844.

4—Primrose v. Western U. Tel. Co., (1893) 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. 1098; Fergusson v. Anglo-American Telegraph Co., (1896) 178 Pa. 377, 35 Atl. 979, 35 L. R. A. 554, 56 Am. St. Rep. 770.

5—"It is urged that, the message being in code and unexplained, a recovery cannot be had. * * * But code messages in the milling and grain business are common, and are known by the telegraph companies to be important. In this case, the message was only partly in code, and the manager of the telegraph company admitted that he knew it was a business message; and even to one unfamiliar with the grain dealer's

156. **Who May Maintain Action Against a Telegraph Company for Its Failure to Send a Message Promptly and Correctly.**—Obviously, the contract for the transmission of a message being between the sender and the telegraph company, the sender has his action for any violation of the contract by the company.[6] It is also held that the telegraph company is liable to the sendee for loss of the message or delay or error in its transmission.[7]

Like a common carrier, a telegraph company is under a general legal duty to the public. It is not a carrier, but it is under a public duty to convey messages skilfully and carefully, and is under a specific duty to senders and sendees to exercise due skill and care in the transmission of their messages. Violation of this legal duty by a telegraph company is a tort, just as the violation of a similar duty by a common carrier is a tort, so that, independently of the sendee's right to sue on the contract of transmission, he has his action in tort.[8] However, in many instances, the right of the sendee to sue on the contract itself is unquestionable, as it frequently happens that the sendee, and not the sender, is the real party in interest or the party for whose benefit the telegram is sent;[9] or it happens that the sendee has some interest at least in

code the message disclosed that something or other involved in the grain or milling business was booked on Kansas City basis. That was all the defendant needed to know about it, to charge it with notice that a failure to transmit the message correctly would probably lead to serious consequences.'' —Shawnee Milling Co. v. Kansas Postal Telegraph-Cable Co., (1917) 101 Kan. 307, 166 Pac. 493, L. R. A. 1917 F 844; Western Union Tel. Co. v. Eubank, (1897) 100 Ky. 591, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361, 1 Am. Neg. Rep. 244.

6—Primrose v. Western U. Tel. Co., (1894) 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. 1098.

7—Herron v. Western Union Tel. Co., (1894) 90 Ia. 129, 57 N. W. 696.

8—Bailey v. Western Union Tel. Co., (1910) 227 Pa. 522, 76 Atl. 736, 19 Ann. Cas. 895; Tobin v. Western Union Tel. Co., (1892) 146 Pa. 375, 23 Atl. 324, 28 Am. St. Rep. 802.

9—Western Union Tel. Co. v. Adams, (1889) 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920.

the prompt and correct transmission of the message.[10] It would seem that the addressee of a message announcing sickness or death of a relative or friend would be such a party in interest as would have a right of action for breach of the contract of transmission, and it is usually so held.[11] Strangely enough, however, it has been held that the addressee of a message announcing illness is not, merely because of his being addressee, either a party to the contract or a party for whose benefit the contract has been made, and that he has no right of action.[12] This holding is placed partly upon the ground that there was nothing in the message to show the defendant that its transmission would be of benefit to the plaintiff. It might properly be asked whether messages announcing sickness or death are not usually in regard to the illness or demise of a relative or very close friend of the addressee, so that any message of this kind should of itself indicate that the addressee is interested in receiving it and that he will feel himself injured by its delay or non-transmission, even if he does not receive a positive benefit from the prompt transmission of the message.[13] The

10—Herron v. Western U. Tel. Co., (1894) 90 Ia. 129, 57 N. W. 696. In this case, defendant negligently failed to deliver to plaintiff a telegram making him an offer for his horse, an inferior animal, with no market value in the vicinity in which he then was, valuable only for breeding purposes. Plaintiff later sold the horse for a less sum than the amount of the telegraphic offer, but for all that could be realized for him with reasonable effort to secure the best price obtainable. Held, that plaintiff can recover the difference between the price offered in the message and the price later received.

In such cases, both sender and addressee have interest in the performance of the contract of transmission. Prospective buyer and seller are both parties in interest. See also Western Union Tel. Co. v. Du Bois, (1889) 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

11—International Ocean Tel. Co. v. Saunders, (1893) 32 Fla. 434, 14 So. 148, 21 L. R. A. 810; Mentzer v. Western Union Tel. Co., (1895) 93 Ia. 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L. R. A. 72; Western Union Tel. Co. v. Gahan, (1897) 17 Tex. Civ. App. 657, 44 S. W. 933.

12—Western Union Tel. Co. v. Wood, (1893) 57 Fed. 471, 6 C. C. A. 432, 13 U. S. App. 317, 21 L. R. A. 706.

13—See Davis v. Western Union

sendee clearly has a right to maintain an action where the sender is merely his agent.[14]

The telegraph company is also liable to those who appear in the message to be beneficiaries thereof.[15]

Furthermore, it is also liable to an undisclosed principal of the sender, but not to an undisclosed principal of the addressee.[16]

A stranger cannot, by acting upon a telegram erroneously transmitted, make the telegraph company liable for such damage as he may suffer by reason of his so acting. The company owes him no duty.[17]

157. **Telephone Companies.**—A telephone company encounters only a few of the possibilities of liability en-

Tel. Co., (1900) 107 Ky. 527, 21 Ky. Law 1251, 54 S. W. 849, 92 Am. St. Rep. 371.

14—Western Union Tel. Co. v. Cunningham, (1892) 99 Ala. 314, 14 So. 579. Here plaintiff wired his sister, asking her to inform him in regard to his mother's health. This was held to constitute the sister the plaintiff's agent, so that a contractual relation existed between plaintiff and defendant as to the transmission of the reply, making the company liable in a contract action for delay in such transmission.

15—Western Union Tel. Co. v. Schriver, (1905) 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678; Whitehill v. Western Union Tel. Co., (1905) 136 Fed. 499.

16—"It is contended that, because the telegraph company owes the duty of care to receive and transmit messages correctly to the addressees, to the senders, and to the undisclosed principals of the senders, it therefore owes it to the undisclosed principals of addressees. But the duty to the undisclosed principals of senders rests on the fact that contracts have been made between the senders and the telegraph company, and that in the negotiation and enforcement of contracts the law places undisclosed principals in the shoes of their agents, so that the telegraph company, which must know the law, is charged with notice, and may reasonably anticipate that its misrepresentations may affect them. It has no contracts with addressees, and hence it is not charged by the law with notice that their undisclosed principals, or others to whom they may display the messages, will probably be affected by them."—Western Union Tel. Co. v. Schriver, (1905) 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678. See also Dodd Grocery Co. v. Postal Tel. Cable Co., (1901) 112 Ga. 685, 37 S. E. 981.

17—McCormick v. Western Union Tel. Co., (1897) 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684.

countered by a telegraph company. The former, having no control over the framing of the message conveyed, has none of the duty of correct transmission of a message, as has the latter. A telephone company owes it to the public and to all the members thereof who wish to contract and pay for it, good service. It is liable for wrongful refusal or failure to give such service, as is any other public service corporation; and, for such refusal or failure, it must respond in damages for all losses proximately resulting therefrom.

Where a telephone company wrongfully discontinues service to a business man, it must compensate for losses proximately resulting from the wrong, including loss of profits.[18]

Damages for wrongful withdrawal of a telephone include, besides pecuniary elements, all such non-pecuniary elements as may be present in the case, such as inconvenience and annoyance.[19]

CASE ILLUSTRATIONS

1. A and B were partners dealing in horses and mules. B went to St. Louis, with the understanding that he should purchase mules only after he had telegraphed prices and received instructions from A. B delivered to defendant for transmission a telegram to A, stating that he could buy mules fifteen and one-half hands high for $117.50. Defendant incorrectly transmitted the telegram to read $107.50. A therefore instructed B to buy 24 mules of that size instead of cheaper mules, which he could have sold for about the same price. Held, that A and B can recover of defendant the difference of $10 on each mule purchased.[20]

18—Harbaugh v. Citizens Telephone Co., (1916) 190 Mich. 421, 157 N. W. 32, Ann. Cas. 1918 E 117.

19—Carmichael v. Southern Bell Telephone Co., (1911) 157 N. Car. 21, 72 S. E. 619, 39 L. R. A. (N. S.) 651, Ann. Cas. 1913 B 1117.

20—Hays v. Western Union Tel. Co., (1904) 70 S. Car. 16, 48 S. E. 608, 67 L. R. A. 481, 3 Ann. Cas. 424, 106 Am. St. Rep. 731, Gary, J., saying in dissent: "The direct and proximate result of the error in sending the message was to cause the plaintiffs to purchase the

2. Defendant telegraph company failed to deliver to plaintiffs a message advising them of the state of the hog market at St. Joseph, to which point plaintiffs intended to ship hogs. Not hearing from St. Joseph, plaintiffs shipped their hogs to Kansas City, a point farther away, where they received a lower price than they would have received at St. Joseph. Held, that plaintiff can recover as damages the difference between the market price at St. Joseph and that at Kansas City, plus excess of freight charges to the latter place over charges to the former.[21]

3. Defendant telegraph company failed to deliver to plaintiff a telegram notifying him of the terms of a contract under which he was to labor for $2.50 per day for a period not stipulated. Held, that plaintiff can recover only nominal damages.[22]

4. Plaintiff, a nineteen-year-old boy, delivered a message to defendant, to be transmitted to his brother, at Lovelock, Nevada, requesting him to wire him to Ogden, Utah, a ticket from there to his home at Lovelock. Plaintiff informed defendant's agent at Grand Junction that he had no means to lay over in Ogden. Defendant failed to deliver the telegram, so that plaintiff was left at Ogden, 400 miles from home, with only $1.25. He was forced out of Ogden as a vagrant, and made his way home by alternately walking and getting free rides on trains. Held, that

mules for which they had to pay a larger sum than they contemplated as the purchase money thereof, and the measure of their damages was the difference in the market value of the mules at the time their right of action accrued and the amount they were compelled to pay by reason of said error. This mode of admeasuring damages is more certain than determining the amount of anticipated profits supposed to have been lost by the error. In 8 Am. & Eng. Encyc. of Law 611, it is said: 'Where the damages may be estimated in more than one way, that mode should be adopted which is most definite and certain.' ''

Accord with majority opinion in Hays case: Western U. Tel. Co. v. Dubois, (1889) 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109. See note, ''Liability of Telegraph Company for Erroneous Transmission of Message Announcing Prices or State of Market,'' 3 Ann. Cas. 429.

21—Western Union Tel. Co. v. Collins, (1890) 45 Kan. 88, 25 Pac. 187, 10 L. R. A. 515. It should be noticed that there was evidence here that plaintiffs would have shipped to the nearer point and received the higher price, and not merely evidence that they might have done so.

22—Merrill v. Western Union Tel. Co., (1886) 78 Me. 97, 2 Atl. 847.

plaintiff's elements of damages are: "(1) Price of telegram; (2) wages or compensation for time lost in reaching his home at Lovelock; (3) price of meals and lodging during the time he would be en route; and (4) 'mental worry and distress' accompanying the physical fatigue and cold while out on the winter journey—of course, including the physical suffering itself." $400 held not excessive.[23]

23—Barnes v. Western Union Tel. Co., (1904) 27 Nev. 438, 76 Pac. 931, 1 Ann. Cas. 346, 103 Am. St. Rep. 776.

CHAPTER XXXVIII

Breach of Promise to Marry

158. **In General.**—The action for breach of promise to marry is, in form, an action on a contract; but, in substance, it savors less of contract than of tort.

The elements of damage, in case of breach of promise to marry, may be included under four general heads, namely: pecuniary damage through the making of the contract and the defendant's failure to fulfill it; non-pecuniary, but physical, damage through loss of the marriage; mental suffering; and elements of aggravation. "It is impracticable to lay down precise rules for the assessment of damages in an action for a breach of promise of marriage. Within reasonable limits, the measure of damages is a question for the sound discretion of the jury in each particular case. And in assessing the damages they may take into consideration the plaintiff's pecuniary loss, her loss of opportunities during the engagement to the defendant for contracting a suitable marriage with another, the disappointment of her reasonable expectations of material and social advantages resulting from the intended marriage, the injury to her health and feelings, the wounding of her pride, the blighting of her affections, and the marring of her prospects in life, by reason of the defendant's promise and his refusal to keep it. Compensatory damages may be awarded for any or all these causes if the evidence in the particular case warrants it."[1]

1—Hahn v. Bettingen, (1900) 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669. Chellis v. Chapman, (1891) 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784, says: "It is apparent that, in such an action as

159. **Direct Pecuniary Loss.**—The plaintiff is entitled to recover for such expenditures as she has reasonably made in reliance upon the defendant's promise, as for her bridal trousseau in cases in which the wedding day has been agreed upon and is reasonably near at hand at the time of the expenditures; and she seems also to be entitled to recover for pecuniary gain she would have realized by virtue of the marriage, if the marriage had taken place according to the promise, although not all decisions are clear in the recognition of such a right. An instruction "that the defendant, in case of a breach of his promise, was bound to put the plaintiff in as good condition as if the contract had been performed," has been approved;[2] but a similar instruction has been disapproved as being too complicated and conjectural.[3] Where, from the evidence, it appears that the defendant would have been able to give the plaintiff a good home, the money value of the marriage is enhanced, and the jury may consider this fact in assessing damages.[4]

160. **Loss of Other Opportunities to Marry.**—In assessing damages, the jury may take into consideration the

this, there can be no hard and fast rule of damages, and that they must be left to the discretion of the jury. Of course, that discretion is not so absolute as to be independent of a consideration of the evidence. It is one which is to be exercised with regard to all the circumstances of the particular case, and, as it has frequently been said, where the verdict has not been influenced by prejudice, passion, or corruption, the verdict will not be disturbed by the court." See also Morgan v. Muench, (Ia. 1916) 156 N. W. 819; Grant v. Willey, (1869) 101 Mass. 356; Osmun v. Winters, (1894) 25 Ore. 260, 35 Pac. 250.

2—Mabin v. Webster, (1891) 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199; Lawrence v. Cooke, (1868) 56 Me. 187, 96 Am. Dec. 443. The former case says: "She has the right to recover what would put her in as good a condition pecuniarily as she would have been in if the contract to marry had been fulfilled."

3—Miller v. Rosier, (1875) 31 Mich. 475.

4—Jacoby v. Stark, (1903) 205 Ill. 34, 68 N. E. 557; Chellis v. Chapman, (1891) 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

plaintiff's loss of opportunity during her engagement to contract a suitable marriage with another.[5] The injury to the plaintiff's general future prospects of marriage may also be allowed for as an element of damage.[6] But, where the plaintiff has broken her existing promise to marry another man, at the solicitation of the defendant, and promised to marry him, the loss of the opportunity to marry her jilted lover cannot be considered in assessing damages for the defendant's breach of his promise.[7] In such a case, the efficient cause of the plaintiff's loss is her own wrongful act in breaking the first engagement.

161. **Injury to Plaintiff's Health.**—Where the plaintiff's health is injured by the defendant's refusal to perform the contract to marry, the jury may consider such injury, in assessing damages,[8] and it is even held that it is not necessary to plead specially this injury to health as an item of damage,[9] although such a holding seems hardly grounded in sound principle. It would seem at least questionable whether injury to health is so usual a consequence of such a breach as to warrant the assessment of damages therefor without the plaintiff's specially pleading it.

162. **Mental Suffering** proximately resulting from the defendant's breach of promise may be recovered for

5—Hively v. Golnick, (1913) 125 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann. Cas. 1915 A 295.

6—Goddard v. Westcott, (1890) 82 Mich. 180, 46 N. W. 242. Sometimes, as in Hahn v. Bettingen, (1900) 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669, it is not squarely stated that the plaintiff may recover for loss of future prospects of marriage, but it is said that among the elements of compensation is "the marring of her prospects in life," which would doubtless include prospects of marriage.

7—Hahn v. Bettingen, supra; Trammell v. Vaughan, (1900) 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302.

8—Hively v. Golnick, (1913) 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann. Cas. 1915 A 295.

9—Hively v. Golnick, supra; Duff v. Judson, (1910) 160 Mich. 386, 125 N. W. 371.

here,[10] just as if the breach were a tort. Wounded feelings, mortification, and pain, are such normal, probable and proximate consequences of a breach of promise to marry, that they are very proper elements of compensation.[11]

163. **Injury to the Plaintiff's Affections.**—Another element of damage commonly allowed for is injury to the plaintiff's affections.[12] Perhaps this might correctly be classified as a kind of mental suffering, but it is so often mentioned separately that it is, in itself, of considerable importance. If there is not, logically, any distinction between injury to the affections and an injury to any other mental attribute or condition, still such an injury is accorded a prominent and distinct place. Since it is proper to consider injury to the plaintiff's affections, it follows that it is permissible to show the depth[13] or lack[14] of such affections, in order to increase or diminish the damages. For the purpose of showing the plaintiff's sincere attachment to and affection for the defendant, it is proper to offer testimony that the plaintiff appeared to be so attached,[15] or that the plaintiff, before the breach, did some act indicating attachment, such as abandoning her own church and joining that of the defendant at his

10—Berry v. Da Costa, (1866) L. R. 1 C. P. 331; Coolidge v. Neat, (1880) 129 Mass. 146.

11—Grant v. Willey, (1869) 101 Mass. 356.

12—Coolidge v. Neat, (1880) 129 Mass. 146.

13—MacElree v. Wolfersberger, (1898) 59 Kan. 105, 52 Pac. 69; Trammell v. Vaughan, (1900) 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302. In Stewart v. Anderson, (1900) 111 Ia. 329, 82 N. W. 770, evidence that the plaintiff had been three times engaged to the defendant and had borne him two children, was held admissible to show the plaintiff's affection for the defendant.

14—Dupont v. McAdow, (1886) 6 Mont. 226, 9 Pac. 925. But evidence of the feeling of the plaintiff toward the defendant after the breach of the contract is not admissible, as it does not tend to show the extent of her affection during the engagement. Robertson v. Craver, (1893) 88 Ia. 381, 55 N. W. 492.

15—Sprague v. Craig, (1869) 51 Ill. 288.

request.[16] In order to show an absence of injury to the plaintiff's affections, the defendant may properly show facts and circumstances indicating the plaintiff's lack of affection for him.[17]

164. **Remote Damage.**—The usual rule that only the proximate results of a wrong are regarded in the assessment of damages, applies here as elsewhere. Some courts, however, go a long way in sustaining the award of damages for consequential losses which would not commonly result from a breach of promise, but which seem to be natural and probable consequences which should have been foreseen by the defendant, in the particular case. Some of these cases, at first glance, seem extreme; but they appear a little more plausible upon careful consideration of all the circumstances involved in them. Probably the strangest of such cases reported is Duff v. Judson,[18] allowing the plaintiff, in an action for breach of promise, to recover for the loss of her arm; but the correctness and splendid justice of the decision, under all the peculiar and unusual circumstances of the case, seem almost compelling; especially in view of the fact that the evidence showed that the casting off of the plaintiff by the defendant, under all the circumstances, might have caused the loss of her arm, and that there was some evidence tending to show that it actually did cause it.

165. **Aggravation.**—Many kinds of acts and circumstances connected with the breach may be considered by the jury in aggravation of damages, or, as some cases put it, in justification of the assessment of exemplary damages.[19] This aggravation or increase of damages is

16—McElree v. Wolfersberger, supra.

17—Dupont v. McAdow, supra.

18—(1910) 160 Mich. 386, 125 N. W. 371.

19—See Sedg. Dam. (9th ed.) § 639; Morgan v. Muench, (Ia. 1916) 156 N. W. 819. In Chamberlain v. Williamson, (1814) 2 M. & S. 408, 105 Eng. Repr. 433, Le-

grounded sometimes upon one, sometimes upon the other, sometimes upon both, of two theories: first, that circumstances aggravating a breach merely show malice; or second, that such circumstances increase the mental anguish of the plaintiff. Punishment, and not compensation, has been held to be the purpose of increased damages assessed because of aggravating circumstances accompanying the breach, although the courts that ground the assessment of exemplary damages upon the fact that the mental anguish of the plaintiff is increased by the wantonness or malice of the defendant, really are stating an argument more plausible for increasing the compensatory damages than for assessing punitive damages.[20] This is, however, probably in part a result of mere loose use of language and in part a result of the strange theory existing in some states, in regard to all kinds of cases of exemplary damages, that they are assessed as compensation for mental suffering.

Among the things held to aggravate damages for breach of promise are: seduction under promise of marriage, with or without impregnation; pregnancy as a result of a seduction under such promise; slanderous or libelous statements by the defendant in regard to the plaintiff in his defense of the action; the manner in which the defendant committed the breach; the fact that the defendant made his promise without intending to perform; and the defendant's cruel, wanton, and insulting conduct toward the plaintiff in connection with the breach.

Where the plaintiff is seduced by the defendant in consequence of a marriage promise existing between them, the jury may take the seduction into consideration as

blanc, J. said that, though damages in such actions are given strictly as a compensation, yet they are almost always considered by the jury somewhat in poenam.

20 — But see Trammell v. Vaughan, (1900) 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. Rep. 302. "If the defendant entered his suit in malice, and not in love, this aggravated the plaintiff's damages, and she is entitled to recover compensation therefor, but not punitive damages."

aggravating the damage.[21] But the seduction must be a real one and by reason of the promise;[22] it must not be mere willing sexual intercourse not resulting from the promise of marriage. Whether such intercourse be before or after the promise, it does not aggravate damages for the breach of promise, if it was merely the result of the plaintiff's inclination, passion, or cupidity. "If it appear that a woman has willingly associated herself in the sexual act with a man other than her husband, in a manner and by conduct which excludes the existence of any other barrier of virtue or chastity of character needing to be overcome by seductive arts, and that she continued such intercourse at short intervals without suggestion of any repentance or reformation or other break in its continuity, the mere fact that in the course thereof, and after the illicit relations are established, there intervenes a promise of marriage cannot support a finding that the seduction has been accomplished by such promise, although she may testify that she continued the libidinous relation by reason of it."[23]

In a case involving aggravation of the breach by seduction, loss of virtue, shame, and mental anguish, are elements proper to be considered in determining the damages, they being proximate results of the seduction, which is a mere incident of the breach.[24]

Where the plaintiff makes no charge, in either pleading or evidence, that the defendant seduced her, seduction

21—Fidler v. McKinley, (1859) 21 Ill. 308; Tubbs v. VanKleek, (1851) 12 Ill. 446; Poehlmann v. Kertz, (1903) 204 Ill. 418, 68 N. E. 467; Whalen v. Layman, (1828) 2 Blackf. (Ind.) 194.

22—Espy v. Jones, (1861) 37 Ala. 379.

23—Salchert v. Reinig, (1908) 135 Wis. 194, 115 N. W. 132. The same court has, however, held that acts of sexual intercourse, often permitted by plaintiff in reliance upon defendant's promise of marriage, are proper to consider in aggravation of damages. Falkner v. Shultz, (1915) 160 Wis. 594, 150 N. W. 424.

24—Davis v. Padgett, (1915) 117 Ark. 544, 176 S. W. 333.

cannot, of course, be considered by the jury in assessing the damages.[25]

Where the defendant has, by means of the engagement, seduced the plaintiff, and she has by reason thereof, become pregnant, her pregnancy and the resulting birth of an illegitimate child may be considered in assessing damages. The plaintiff cannot recover compensation for the maintenance of the child in this type of action, but it has been held that the jury may consider the condition in which the plaintiff is left by the defendant's breach, including her obligation to support her bastard child.[26] Damages can be assessed on account of the plaintiff's mortification or shame, caused by the fact that she is the mother of a bastard child, the result of the seduction under promise of marriage.[27]

Slanderous or libelous remarks in regard to the plaintiff by the defendant in connection with the breach may be considered as showing the malice of the defendant and as therefore justifying the assessment of larger damages.[28] Where the defendant, in bad faith, knowing that he cannot prove his allegations, or having no reason to believe that he can prove them, pleads or tries to prove the bad character of the plaintiff particularly her lack of chastity, this is a matter proper to be considered by

25—A case in point, based upon unusual facts, is Broyhill v. Norton, (1903) 175 Mo. 190, 74 S. W. 1024. "The verdict was for the plaintiff for $25,000. We have no doubt that the conduct of the defendant on the trial, and the character of his testimony, were chiefly the cause of this large award. His speech was flippant in style, and abounded in indecent insinuations. His innuendo that he was criminally intimate with the plaintiff was altogether voluntary. If the jury obtained the idea that he had seduced the plaintiff, and for that reason made the assessment of damages more heavy than they otherwise would have done, he alone conveyed that idea to them. The plaintiff made no such charge, and denied the fact." The court then proceeds to hold, very properly, that seduction could not be considered by the jury as an element of damage in this case.

26—Welge v. Jenkins, (Tex. Civ. App. 1917) 195 S. W. 272.

27—Id.

28—Roberts v. Druillard, (1900) 123 Mich. 286, 82 N. W. 49.

the jury in aggravation of damages. It is usually held that an attempt, made in good faith, to prove the plaintiff's lack of chastity, does not aggravate damages. "If he makes the attempt to establish such facts, in good faith, under circumstances which induce him to believe that he can make the proof, and fails, he does not by that failure, subject himself to additional damages. But when the attack is wanton, or dictated by malice and only to further blacken the character of the plaintiff, and the attempt is not in good faith; it is a wrong that may be considered by the jury as an aggravation of damages."[29] Slander or libel cannot, however, be recovered for as a substantial element of damages in a breach of promise case, it being merely a matter to consider as evidence of the defendant's malice and therefore constituting aggravation of damages or ground for the assessment of exemplary damages.[30] The defendant's attorney may, in argument, attack the character of the plaintiff, by improperly commenting upon the evidence, without subjecting his client to the aggravation of damages. If the argument of the attorney is improper, it is the duty of the

29—Fidler v. McKinley, (1859) 21 Ill. 308; Luther v. Shaw, (1914) 157 Wis. 231, 147 N. W. 17.

30—Roberts v. Druillard, (1900) 123 Mich. 286, 82 N. W. 49, in disapproving an instruction that the jury might, "in the exercise of a sound and reasonable discretion, award her such additional damages as in your judgment she has suffered by reason of the false and slanderous statements so made by the defendant," says: "This language was broad enough to lead the jury to understand that they could award full damages for these slanders to the same extent as would have been permissible had the various slanders been counted upon in an action for defamation. It has been said that the testimony was admissible, but it was only for the purpose of showing a bad motive, by way of aggravation of damages, just as willfulness and malice may be shown in a case of tort, to which this class of cases are by the authorities cited said to be analogous in some respects. The proof of these slanders was admissible, not as substantive causes of action, but as explanatory of the act of the defendant in breaking the contract, just as a libel not declared upon is admissible to explain the animus of a defendant in publishing the libel counted upon in an action for defa-

trial judge to stop him; such a duty is not incumbent upon his client.[31]

Where the defendant, in his pleadings, unsustained by evidence, charges the plaintiff with having had no affection for him, but with entertaining a purpose to procure money from him on the pretense of his promise to marry her, and his breach thereof, it has been held, without any mention of aggravation in terms, that this is an element which may properly be considered by the jury in determining the amount of damages.[32]

The fact that the defendant has abruptly broken the engagement at the very time set for the marriage, thus causing the plaintiff to be humiliated by being left "waiting at the church" in the presence of her friends, is a circumstance to be considered in aggravation.[33]

The length of time between the making of the engagement and the breach is a matter for the consideration of the jury in fixing damages. If the engagement has continued for many years, the damage caused by the promise and its breach may be much greater than in the case wherein the engagement has continued for only a few days or a few months. In the case of a long engagement, the plaintiff may, in reliance upon the defendant's promise, have passed from girlhood to aged spinsterhood, rejecting all suitors' attentions as the years went by. As has been well said in regard to the length of the engagement, "it might be very material in its effect upon the plaintiff's condition and prospects, and might under some

mation. An examination of the authorities will show this. In those jurisdictions where punitory damages are permitted, the rule is that these slanders may be shown as a basis for them. Sutherland says, in his work on Damages (section 987), that circumstances are admissible to show wantonness and ruthlessness, and that she may be allowed, not only full compensation (i. e., for the breach of promise, not slander), but by way of punishment."

31—Pearce v. Stace, (1913) 207 N. Y. 506, 101 N. E. 434.

32—Chellis v. Chapman, (1891) 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

33—Chellis v. Chapman, supra.

circumstances be a decided aggravation of her injury."[34] The length of the engagement is very material.

166. **Mitigation.**—Just as it is proper to admit testimony to aggravate or increase the damages consequent upon the breach, so it is proper to permit proof of those facts which tend to mitigate or lessen them. In mitigation of damages, those facts and circumstances may be shown which tend to diminish the plaintiff's loss by reason of the breach, and also those which indicate a lack of malice on the part of the defendant.

Probably the ground most frequently relied upon in mitigation is the bad character or unchaste conduct of the plaintiff, which, if shown, clearly mitigates the damages. If the plaintiff is an unchaste woman, she is not so deeply wronged by a breach of promise of marriage as is a woman who is chaste and pure. If she is unchaste, her sense of humiliation and her loss of character and reputation because of the loss of the marriage, are likely to be less.[35] But "where, after a promise of marriage, a woman is seduced and deserted by her lover, in consequence of which she acquires a bad character, he shall not be permitted to avail himself of that character, in mitigation of damages, in an action brought by her for the injury resulting from his breach of promise to marry her."[36]

The general rule as to the effect of the proof of the unchastity of the plaintiff, has been stated as follows: "1. That if the woman was of bad character at the time of the contract, and that was unknown to the defendant, the verdict ought to be in his favor. 2. That if the plaintiff, after the promise, had prostituted her person to any person other than the defendant, she thereby discharged the defendant. 3. That if her conduct was improperly

34—Grant v. Willey, (1869) 101 Mass. 356.

35—Young v. Corrigan, (1912) 208 Fed. 431.

36—Boynton v. Kellogg, (1807) 3 Mass. 189.

indelicate, although not criminal, before the promise, and it was unknown to the defendant, it ought to be considered in mitigation of damages. 4. That if such was her conduct after the promise, it was proper, in the same view, for the consideration of the jury."[37] It might further be said that if the plaintiff was unchaste at the time of the promise and defendant knew she was unchaste, such unchastity, even then, could be considered in mitigation of damages,[38] as the injury to the feelings of the unchaste woman here is less than to a chaste and upright woman under similar circumstances; but there are authorities *contra*.[39]

But the fact that there was illicit intercourse between the plaintiff and the defendant before the promise as well as afterward, cannot be taken to mitigate the damages. "It is generally held that the criminal misconduct of the plaintiff, known to the defendant before he made the promise, and encouraged and participated in by him, cannot be used in mitigation of the damages."[40]

If the plaintiff is guilty of habitual drunkenness or of

37—Boynton v. Kellogg, supra; quoted with approval in Butler v. Eschelman, (1856) 18 Ill. 44.

38—Denslow v. Van Horn, (1864) 16 Ia. 476.

39—Espy v. Jones, (1861) 37 Ala. 379; Butler v. Eschelman, supra.

40—Fleetford v. Barnett, (1898) 11 Colo. App. 77, 52 Pac. 293, citing Espy v. Jones, supra; Butler v. Eschelman, (1856) 18 Ill. 44; Boynton v. Kellogg, (1807) 3 Mass. 189; Colburn v. Marble, (1907) 196 Mass. 376, 82 N. E. 28, 124 Am. St. Rep. 561; Daggett v. Wallace, (1889) 75 Tex. 352, 13 S. W. 49, 16 Am. St. Rep. 908. But see Dupont v. McAdow, (1886) 6 Mont. 226, 9 Pac. 925, as follows: "The record does not show that the plaintiff's affections were in any way implicated in this matter. She lived and cohabited with the defendant as his mistress, for money, at so much per month, and the evidence fails to show that her affections have been wounded in the least degree by his failure to marry her; so that injury to her affections could not properly have been considered by the jury in estimating the damages." The Dupont case can hardly be considered as being contra to the general rule; the peculiar facts in the case, including the important fact that the plaintiff was a mere paid mistress, make a different case from that in which there has merely been illicit intercourse consequent upon the engagement.

other misconduct tending to show that she is unfit to enter the marriage relation with the defendant, that fact may be considered in mitigation of damages.[41] It has been held that the licentious conduct of the plaintiff, after the breach, may be considered in mitigation of damages. This is on the ground that an action for breach of promise is in part for a loss of reputation, and that such reputation must depend upon the plaintiff's general conduct after, as well as before, the breach. "The proof of reputation cannot depend on time; it is a question which is general in its nature, and the inquiry respecting it, where material, must be general."[42]

The strange but important question has been raised, whether, in the case of a breach of promise, aggravated by seduction, the damages would be mitigated by the fact that, after the breach, the plaintiff sought out the defendant and shot him. Without any statement of reasons for the holding, it is said that evidence of such shooting is not admissible in mitigation of damages.[43] Probably the reason is that the shooting constitutes a cause of action wholly separate and distinct from the engagement and its breach.

The existence of a promise on the part of the defendant to marry a third person, neither bars the action nor mitigates damages;[44] nor would the marriage of the defendant to a third person have such an effect, on principle, although it seems to have been accorded some weight as a circumstance affecting the reasonableness of a large award.[45]

41—Button v. McCauley, (1867) 1 Abb. Dec. 282, 5 Abb. Prac. (N. S.) 29.

42—Johnson v. Caulkins, (1799) 1 Johns. (N. Y.) 116, 1 Am. Dec. 102; followed in Palmer v. Andrews, (1831) 7 Wend. (N. Y.) 142.

43—Schmidt v. Durnham, (1891) 46 Minn. 227, 49 N. W. 126.

44—Roper v. Clay, (1853) 18 Mo. 383, 59 Am. Dec. 314.

45—"The defendant is now married, and to give considerably more than half of his property as damages upon the facts appearing here, even if there had been no express release, we regard as out of the bounds of reason."—Kellett v. Ro-

The bad health of the defendant is also a fact to be considered in mitigation, and is often a matter of first importance; since this would have been likely to diminish the period of the marriage and to render the married state, during its existence, less advantageous to the plaintiff.[46]

Opposition to the marriage by a parent of one of the parties may be shown in mitigation of damages. Such opposition sometimes affords a reasonable, although not legally adequate, cause for not carrying out the contract; and, since it tends to show that the breach was not wanton, it may properly be shown in mitigation, preventing the assessment of exemplary damages.[47] Where an aged man breaks his promise to marry, owing partly to the opposition of his daughter, such opposition has at least inferentially been held to be such a mitigating circumstance as to prevent the assessment of aggravated or exemplary damages.[48]

Where the defendant has broken his promise because of a change of circumstances, which do not legally justify the breach, but which negative the whole idea of a cruel and wanton abandonment, and where he further takes care, even in the breach, not to injure needlessly the feelings and reputation of the plaintiff, such reason and manner of his conduct may properly be shown in mitigation, or, more properly speaking, in prevention of the assessment of exemplary damages.[49]

The mere fact that the plaintiff has, since the defendant's breach, succeeded in finding a husband, does not so mitigate her damages as to render her case one for

bie, (1898) 99 Wis. 303, 74 N. W. 781.

46 — Parsons v. Trowbridge, (1915) 226 Fed. 15, 140 C. C. A. 310; Sprague v. Craig, (1869) 51 Ill. 288; Mabin v. Webster, (1891) 129 Ind. 430, 28 N. E. 863, 28 Am. St. Rep. 199.

47—Johnson v. Jenkins, (1862) 24 N. Y. 252.

48—Goddard v. Westcott, (1890) 82 Mich. 180, 46 N. W. 242.

49—Johnson v. Jenkins, supra.

nominal damages only. Even in such a case, she may already have been materially injured by the breach, and so may recover substantial damages. This is so, even if the marriage she has contracted is as happy or more so than a marriage with the defendant would have been.[50]

The plaintiff's damages are not mitigated by the fact that her father has recovered for her seduction, as her father's action is not her action; and what has been done in his action is *res inter alios acta* and incapable of working prejudice to a person not a party or privy to the record.[51]

As has already been seen, the plaintiff's depth or lack of affection is to be considered in assessing damages. It frequently happens that a jilted woman, after the breach, makes declarations that she, at no time during the engagement, cared anything for her affianced lover, and that all she wanted was his money. Such declarations are admissible in evidence in mitigation of damages, as it is clear that a person feeling no affection for the person to whom she is affianced, will be injured little or none by a breach of promise.[52] Likewise, declarations of the plaintiff that she only proposed to marry the defendant to spite his family, that she had refused to live at his house, and did not propose to marry him to live in any residence he had or place where he was living, are admissible in mitigation of damages. Such declarations tend to mitigate damages, whether made before or after the breach, if they refer to the plaintiff's state of mind before the breach.[53]

An offer by the defendant to marry the plaintiff, after

50—Fisher v. Barber, (1910) 62 Tex. Civ. App. 34, 130 S. W. 871.

51—Coryell v. Colbaugh, (1791) 1 N. J. Law 77, 1 Am. Dec. 192.

52—Robertson v. Craver, (1893) 88 Ia. 381, 55 N. W. 492; Miller v. Rosier, (1875) 31 Mich. 475.

53—Miller v. Rosier, supra; Hook v. George, (1868) 100 Mass. 331, goes so far as to hold that the plaintiff's admissions after the breach, as to her then present feelings, were admissible as having some tendency to show what her past views had been.

the breach of promise but before suit, may be considered in mitigation of damages,[54] and, according to the better view, this is true, whether the offer be made before or after the commencement of suit.[55] In order to have such

54—Kurtz v. Frank, (1881) 76 Ind. 594, 40 Am. Rep. 275. In Kendall v. Dunn (1912) 71 W. Va. 262, 76 S. E. 454, 43 L. R. A. (N. S.) 556, it is said that the jury may give to such offer, made after breach and before suit, such weight in assessing damages as they think it deserves.

55—McCarty v. Heryford, (1903) 125 Fed. 46; Kelly v. Renfro, (1846) 9 Ala. 325, 44 Am. Dec. 441; Stacy v. Dolan, (1914) 88 Vt. 369, 92 Atl. 453. In the last mentioned case it should be noted that the offer appeared to be bona fide and that the character and condition of the defendant remained substantially unchanged. Lack of good faith eradicates such an offer from consideration in mitigation; and an unfavorable change in the defendant's character and condition lessens or destroys its value as a mitigating factor. Contra, Heasley v. Nichols, (1905) 38 Wash. 485, 80 Pac. 769. Bennett v. Beam, (1880) 42 Mich. 346, 4 N. W. 8, 36 Am. Rep. 442, is often cited in support of the general proposition that defendant's offer to marry, made after the commencement of the action, will not mitigate damages. The following quotation therefrom tends to show the reason for the rule there laid down and the manner in which the disagreeable conduct of the plaintiff, in the particular case, led the court to formulate the rule: "The affection which the plaintiff may have had for the defendant and under the influence of which she may even eagerly have accepted a matrimonial alliance with him, may, by his subsequent conduct, have been turned into loathing and contempt; so that a marriage which at a certain time would have been to her one of the most desirable of events, would at a subsequent period, even in thought, be repulsive. A supposed virtuous man of wealth, refinement and respectability, gains the affections of a young lady, and under a promise of marriage accomplishes her ruin, then abandons her, and enters upon a life of open and notorious profligacy and debauchery, and when sued he offers to carry out his agreement—offers himself in marriage, when any woman with even a spark of virtue or sensibility would shrink from his polluted touch. To hold that the offer of such a skeleton and refusal to accept could be considered, even in mitigation of damages, would shock the sense of justice, and be simply a legal outrage." It probably would have been more sound to say that circumstances such as defendant's falling into profligacy were for the jury to consider in deciding how much or how little his offer would mitigate damages. When the facts of the case are considered, the decision is certainly not authority for the broad proposition that an offer by the defendant to marry, made after the beginning of suit, is never to be taken in mitigation; the decision

effect, in any case, the offer must be *bona fide* and not a mere simulated offer of marriage, simply for the purpose of avoiding the legal consequences of the breach.[56] It certainly seems clear, on principle, that the fact that the defendant has offered the plaintiff all that she sues to be compensated for, should be considered in mitigation.

167. **Evidence of the Defendant's Wealth.**—As a general rule, the measure of compensation cannot be affected by the wealth or poverty of the defendant; but, to this rule, cases of breach of promise of marriage form a conspicuous exception. As the value of the marriage to the plaintiff depends in part upon the amount of his wealth, evidence of such amount may properly be considered by the jury in fixing compensatory damages.[57]

Here, as elsewhere, such evidence is admissible also for the purpose of determining the amount of exemplary damages to be assessed in order really to punish the defendant, if his breach has been malicious.[58] But evidence of the financial condition of the defendant's relatives is not admissible, as such condition does not affect the value of the marriage or the matter of the punishment of the defendant.[59]

Evidence of even the mere reputation of the defendant for wealth is admissible as affecting the question of damages, since such reputation, in a measure, determines the social standing of the defendant and likewise the place in

is based upon defendants' change of condition and circumstances. Kendall v. Dunn, (1912) 71 W. Va. 262, 76 N. E. 454, 43 L. R. A. (N. S.) 556, holds that an offer to marry, after bringing of suit, does not mitigate damages, although it may mitigate if made before suit.

56—Kelly v. Renfro, (1846) 9 Ala. 325, 44 Am. Dec. 441.

57—Jacoby v. Stark, (1903) 205 Ill. 34, 68 N. E. 557; Herriman v. Layman, (1902) 118 Ia. 590, 92 N. W. 710; Chellis v. Chapman, (1891) 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

58—For general rule, see Chapter XI, "Exemplary Damages," last paragraph.

59—Miller v. Rosier, (1875) 31 Mich. 475; Spencer v. Simmons, (1910) 160 Mich. 292, 125 N. W. 9, 19 Ann. Cas. 1126.

the social world which would have been gained by the plaintiff if the marriage had taken place.[60]

The facts as to the defendant's wealth are important only as assisting in the determination of the amount of compensatory and exemplary damages; they are not admissible for the purpose of proving his mere ability to pay. A ruling *contra* would be as unjust here as in any other field of the law of damages.

168. **Excessive Damages.**—There are many instances in which, in view of all the circumstances of the case, including the amount of wealth of the defendant, the judgment is held excessive. The logical ground of all such holdings, is not that the defendant was not able to pay so much, but rather that the value of the marriage would not have been so great, so far as the plaintiff is concerned, or, if the case is one in which the question of exemplary damages has been raised, that no malice was shown in the breach of the contract or that the degree of malice shown was insufficient to justify a verdict so largely in excess of fair compensation.

169. **General and Special Damages.**—In a breach of promise action, as elsewhere, only general damages can be recovered, unless special damages are grounded on pleading and proof.[61] For an injurious result which is not implied by law from the mere statement of the promise and its breach, a recovery cannot be based upon pleadings setting forth only such a general statement, even if the result is proximate. Injury to the health of the plaintiff;[62] seduction, without pregnancy; seduction, with pregnancy; the birth of an illegitimate child, resulting

60—Chellis v. Chapman, (1891) 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

61—Tyler v. Salley, (1889) 82 Me. 128, 19 Atl. 107.

62—Bedell v. Powell, (1852) 13 Barb. (N. Y.) 183.

from such seduction, and also the accompanying humiliation; and reasonable expenditures in preparing for the marriage; are all, in varying combinations and degrees in different cases, proximate results of the contract and its breach; but they must be pleaded and proved, since, though proximate, they are not necessary results or the results which a court can regard as implied by the setting up of a breach of promise.[63] There is great diversity of judicial opinion as to what results are necessarily implied by a breach of promise. For instance, some jurisdictions, in seeming disregard of the fundamental principles of all pleading, permit recovery for seduction without any allegation thereof in the pleadings and with only a claim for general damages;[64] and some courts hold that injury to health need not be specially pleaded.[65] Such rulings seem very strange, when one considers that a majority of engagements and breaches thereof undoubtedly transpire without any seduction or any injury to health. To hold that seduction may be recovered for without special allegation, is tantamount to holding that seduction is so necessary a result of an engagement and its breach as to be necessarily implied from a mere general statement of the cause of action. Merely to assert such a proposition is to demonstrate its absurdity. Sympathy for the plaintiff has doubtless caused some courts to make such rulings in order to save her from the misfortune of losing the larger part of her proper damages through the mistake of her attorney in not pleading them. Individual differences of opinion, however, as to what may properly be inferred from a general statement of a cause of action, seem to make impossible the develop-

63—Tyler v. Salley, supra.

64—Poehlmann v. Kertz, (1903) 204 Ill. 418, 68 N. E. 467. The reasoning in this case is more emotional than logical.

65—Hively v. Golnick, (1913) 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757, Ann. Cas. 1915 A 295.

ment of any more uniform line of holdings here than on the troublesome subject of proximate cause.

170. **Actions Against or by Personal Representative.**—Ordinarily, the breach of a marriage promise is treated as if it were a personal tort, and no right of action survives for or against the personal representative of either of the parties.[66] It would not be in accord with the general rule of the common law to assess, for or against an executor or administrator, damages for violated faith and disappointed hopes and exemplary damages possibly large enough to render the estate insolvent, to the loss of creditors.[67] The rule is the same, even where the defendant deceitfully entered into the promise, not intending to keep it, and accomplished seduction thereunder, as a result of which the seduced woman died. Although a parent would have an action for the seduction, the administrator of the daughter could not maintain an action for the breach of promise.[68]

But, although the action is quasi-tortious in its nature, the fact that contractual elements are involved in its substance as well as in its form, is not ignored by the courts;

66—Chamberlain v. Williamson, (1814) 2 M. & S. 408, 105 Eng. Repr. 433; in which Lord Ellenborough says: "Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where their wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the court cannot intend it." Referring to this case, counsel for the petitioner, in Stebbins v. Palmer, (1882) 1 Pick. (Mass.) 71, 11 Am. Dec. 146, pertinently remarks: "It will be found, that most of the reasons for that decision are equally favorable to the position, that it does not survive against the administrator of the promisor. The respondent's action is founded upon alleged mutual promises, and there cannot be a greater legal absurdity than that, in such a case, the promise should be allowed to survive to one party, and not to the other." See also Hayden v. Vreeland, (1875) 37 N. J. L. 372, 18 Am. Rep. 723; and Lattimore v. Simmons, (1825) 13 S. & R. (Pa.) 183.

67—Stebbins v. Palmer, supra.

68—Larocque v. Conheim, (1904) 87 N. Y. Supp. 625, 42 Misc. 613.

and so, where special damage to the personal estate of the jilted person is shown, the personal representative of such person may recover, if such special damage is laid in the declaration; and likewise the jilted person may sue the personal representative of the promisor, if his personal estate has been damaged by the breach, provided he plead such special damage.[69] Under this rule, it seems that there may be recovery by or against an executor or administrator, where it is pleaded and proved that the wronged person, in pursuance of one of the terms of the agreement to marry, gave up a remunerative position.[70] It cannot be said that money spent for a bridal trousseau could never be recovered in an action by or against a personal representative. If the contract is such that the plaintiff would naturally buy a trousseau and has actually bought it before the date of the breach, it seems logical that contractual principles should govern as to this point, and that there should be a recovery.[71] In such a case, there is an injury to the plaintiff's personal estate, and such injury is a natural and probably consequence of the breach.

CASE ILLUSTRATIONS

1. Plaintiff kept secret her contract to marry defendant and her illicit relations with him thereunder. Defendant contends

69—Stebbins v. Palmer, (1822) 1 Pick. (Mass.) 71, 11 Am. Dec. 146.

70—Finlay v. Chirney, (1888) 20 Q. B. D. 494, 57 L. J. Q. B. 247.

71—"Perhaps if a date were fixed for the marriage, and the plaintiff purchased her trousseau on the strength of it, this might be held a ground of recovery against the executor."—Sedg. El. Dam. (2d ed.) p. 327. Might this be so, if the date fixed were a year or two subsequent to the time of the breach? Would such early preparation be within the contemplation of the parties? Probably no recovery could be allowed in so extreme a case; and certainly, on principle, none should be allowed. The writer is inclined, however, to agree with Mr. Sedgwick's above-quoted conjecture as to the right of the plaintiff who has purchased her trousseau after the setting of a date for the marriage, as

that, as she told no one of these matters, she suffered no mortification and so could not recover for injury to her feelings. This contention is not sound.[72]

2. The defendant, a physician and surgeon living with the plaintiff under circumstances that tended to indicate the existence of a common law marriage, and having children by her, promised to marry her. The plaintiff suffered a burn, which caused a cancerous growth on her arm, in consequence of which the defendant, being "chilled by her looks," cast her off. As a result, plaintiff had to work harder, which prevented her arm from healing; not having healed, the arm had to be amputated. Held, that the loss of the arm being such a loss as the defendant, being a medical man, might reasonably have anticipated as a result of his casting her off, he is liable therefor.[73]

3. The defendant, in an action for breach of promise, in good faith, attempts to prove that the plaintiff is a lewd and base woman, and fails in his proof. Such attempt and failure cannot be taken into consideration in assessing damages.[74]

4. The defendant, in his answer, stated that, at the time of the alleged promise of marriage, "the plaintiff was a common prostitute, and still is so, and was, and is an unchaste woman, and had, and has illicit intercourse with various persons;" but he did not attempt to prove any of these allegations. Held, that "the jury have a right to take this circumstance into consideration, in aggravation of the damages to which the plaintiff may be entitled."[75]

5. The defendant gave notice that he would prove in his defense that the plaintiff had at various times and with various persons, specifying them, committed fornication after the alleged promise of marriage. He tried to prove this part of his defense, at the trial, but failed; and, from the testimony of his own witnesses, it appeared that there was not even suspicion of her unchastity. On these facts, the setting up of such defense is ground for the awarding of exemplary damages.[76]

expressing a correct general rule, subject only to the exception suggested.

72—Morgan v. Muench, (Ia. 1916) 156 N. W. 819.

73—Duff v. Judson, (1910) 160 Mich. 386, 125 N. W. 371.

74—Fidler v. McKinley, (1859) 21 Ill. 308; Denslow v. Van Horn, (1864) 16 Ia. 476.

75—Thorn v. Knapp, (1870) 42 N. Y. 474, 1 Am. Rep. 561.

76—Southard v. Rexford, (1826) 6 Cowen (N. Y.) 254.

6. The defendant, in an attempt at mitigation of damages, sets up the unchastity and various unchaste acts of the plaintiff, having no sufficient reason to believe that his allegations are true, though he does not know that they are untrue. These allegations are made in bad faith, and therefore may be considered in aggravation of damages.[77]

7. The defendant, a married man, representing himself to be single, promised to marry the plaintiff, who, finding that the defendant was married, consented to continue the contract, with the understanding that the defendant get a divorce from his present wife. This consent, if given freely and understandingly, and uninfluenced by fraudulent representations, may be considered in mitigation of damages.[78]

8. In an action for breach of promise, the court instructed the jury that if the person guilty of the breach "had pernicious anemia, and believed that it would be fatal after a year or so from such time, you would have a right to consider that upon the question of amount of damages. Under the testimony offered, if he had pernicious anemia, which would be reasonably certain to bring about death within several months or a year, or something like that, she would have his society for such shorter time and would be entitled to recover a lesser amount. So you will consider the testimony with reference to pernicious anemia as bearing upon that phase of the case and that only." Held, sufficiently favorable to plaintiff.[79]

9. Defendant agreed to marry plaintiff, knowing that there was a taint of insanity in plaintiff's family. The fact of such taint cannot be considered in mitigation of damages, although it would be otherwise if defendant had been ignorant of such taint at the time of his promise.[80]

10. Defendant, after breaking his promise to marry plaintiff, offered to marry her if she would agree to enter into a prenuptial contract providing that in the event of "a serious disagreement and separation" after marriage, neither party "should have any

77—Leavitt v. Cutler, (1875) 37 Wis. 46.

78—Coover v. Davenport, (1870) 1 Heisk. (Tenn.) 368, 2 Am. Rep. 706.

79—Parsons v. Trowbridge, (1915) 226 Fed. 15, 140 C. C. A. 310.

80—Lohner v. Coldwell, (1897) 15 Tex. Civ. App. 444, 39 S. W. 591.

interest in the property of the other by reason of their marriage." Such an offer neither bars the action nor mitigates the damages.[81]

11. Defendant, an auctioneer and real estate dealer, with a large income from such occupations, and worth, at the time of the trial, about $40,000, broke his promise to marry plaintiff, after seducing her. A verdict for $15,000 is not excessive.[82]

12. The defendant was worth about $12,000. He was engaged to plaintiff for seventeen years. He induced plaintiff to borrow from her sister, for him, the sum of $50, which he agreed to repay, but never did. Plaintiff loaned him money to buy books. He kept plaintiff's watch during the time of their engagement, and accepted presents from plaintiff from time to time. A verdict for $5,000 is not excessive.[83]

13. Defendant in an action for breach of promise, with no aggravating circumstances reported, admitted that he was worth from $75,000 to $100,000, and declined to swear that he was not worth $300,000. Held, that a verdict for $17,425 is not excessive.[84]

14. Plaintiff and defendant, after having long continued sexual relations because of a promise of marriage, made a settlement to cover such relations. Held, that, in an action for breach of promise, the jury must not consider the relations before the settlement.[85]

81—Chapman v. Brown, (1915) 192 Mo. App. 78, 179 S. W. 774.

82—Morgan v. Muench, (Ia. 1916) 156 N. W. 819.

83—Thrush v. Fullhart, (1915) 230 Fed. 24, 144 C. C. A. 322.

84—Cox v. Edwards, (1914) 126 Minn. 350, 148 N. W. 500.

85—Jaskolski v. Morawski, (1914) 178 Mich. 325, 144 N. W. 865.

PART IV

DAMAGES IN PARTICULAR CLASSES OF TORT ACTIONS

CHAPTER XXXIX

Negligent Torts

171. **In General.**—A great many of the actions brought for torts are for negligent wrongs as distinguished from wilful wrongs. One may be negligent in his manner of fulfilling a contract, but the great majority of instances of negligence brought into court for adjudication as such are in actions for torts.

Negligence is the failure to do a legal duty. If no legal duty is neglected, there is no negligence. *A fortiori,* if no duty exists, there can be no negligence.[1]

172. **Negligence and Causation.**—As indicated elsewhere,[2] it is easy to confound the question of proximate cause with that of the existence of negligence; and numerous instances of such confusion can be shown. In determining whether negligence exists, it is often necessary to decide a contested question whether there is any duty. Right here much of the confusion of negligence cases arises; and it is at this point that much of unsatis-

1—"Actionable negligence may flow from the failure of a party to observe a general or particular duty towards others under circumstances that in law impose the duty, where such failure proximately injures another. Whether there has been actionable negligence depends upon the particular facts and the law applicable thereto."—Whitfield, J., in Southern Express Co. v. Williamson, (1913) 66 Fla. 286, 63 So. 433, 7 N. C. C. A. 365.

2—Chapter IV.

factory discussion of naturalness and probability of result in connection with tort cases takes place. Certainly no one is under a duty to foresee and prevent consequences that are so far from being natural and probable that one cannot possibly be said to have contemplated them or consequences of the same general class. So we find many instances in which an action is brought for injuries which the defendant was under no duty to prevent, and in which therefore no negligence is found. Such cases must not be confused with those in which the defendant has actually been negligent, but in which certain of the injurious consequences to the plaintiff are too remote to allow of recovery.[3]

173. **Damage the Gist of Actions for Negligent Wrongs.** —Negligence is not, of itself, a ground for the assessment of damages. Without damage, negligence is not even the basis of an action for nominal damages. In other words, damage is the gist of an action arising out of negligence. Strictly speaking, there is no such thing as an action for negligence; for an action is rather for a negligent injury.

3—"Where the nature of the act or omission is doubtful, the best test of actionable negligence, where available, is the degree of care which persons of ordinary intelligence and prudence commonly exercise under the same or like circumstances. If the care exercised in such a case rises to or above that standard, there is no such negligence; if it fall below there is." —Chicago Great Western Ry. Co. v. Minneapolis, St. P., etc., Ry. Co., (1910) 176 Fed. 237, 100 C. C. A. 41, 20 Ann. Cas. 1200.

CHAPTER XL

Actions for Tortious Damage Pertaining to Realty

174. In General.—The rights of an owner of land or a term therein may be interfered with by a trespass, which may consist either of a mere wrongful entry upon the land or of such an entry plus certain injurious acts thereon; or by acts of waste, committed by a tenant, to the injury of a remainderman or reversioner; or by the maintenance of a nuisance that diminishes the usefulness or value of the premises.

Courts have found it difficult to lay down, in regard to the measure of damages in actions for injury to real property, rules that are complete and easily applicable to all cases.

The extent of the plaintiff's right in the land, limits the measure of his recovery. The nature and extent of the right of the plaintiff in the premises is always of first importance; for he cannot have suffered damage to a greater estate than that which he owned at the time of the perpetration of the wrong. Naturally, if he is a life tenant or a tenant for years, a permanent injury to the property may not damage him so much as if he were owner in fee simple. If the plaintiff is a tenant for one year, his interest in the land cannot sustain so large a damage as if he were a tenant for ten years. A temporary injury to realty may cause a heavy loss to a tenant for life or for years and little or no loss to a remainderman or reversioner.[1]

175. Permanent and Temporary Injury.—The question whether the injury is permanent or temporary, is of

1—Gilbert v. Kennedy, (1870) 22 Mich. 5.

considerable moment.[2] If the injury is permanent, as where the value of the land is permanently impaired by removal of soil, in this case the owner may recover such damages as will compensate him for his permanent loss, which is the amount of depreciation in the value of the property;[3] and, where the plaintiff's land has been temporarily occupied by the defendant, the plaintiff is entitled only to compensation for temporary loss, which is

2—Troy v. Cheshire R. Co., (1851) 23 N. H. 83, 55 Am. Dec. 177.

3—Stoudenmire v. DeBardelaben, (1888) 85 Ala. 85, 4 So. 723; Chicago, K. & W. R. Co. v. Willets, (1891) 45 Kan. 110, 25 Pac. 576. If the cost of restoring the land to its former condition is less than the diminution in value, the defendant has a right to insist that the measure of damages include only the cost of such restoration and the value of the use of the land during the continuance of the condition brought about by defendant's wrong. (The value of the use of the land only for a reasonable time could be included, as the doctrine of avoidable consequences would keep the plaintiff from neglecting to restore the premises and charging up value of use to the defendant for an indefinite time.) See: Vermilya v. Chicago, M. & St. P. Ry. Co., (1885) 66 Ia. 606, 24 N. W. 234, 55 Am. Rep. 279; Hartshorn v. Chaddock, (1892) 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426.

"If the soil, having no value separated from the land, was stripped from it, so as to render it unproductive and unfit for the use to which it was applied, the diminished value of the land would be the only adequate measure of compensation. So, also, where trees designed for shade or ornament have been cut down, whereby the value of the land has been greatly lessened. And in cases of permissive waste, where a purchaser has been kept out of possession, and the land has suffered from lack of cultivation, the court would compel an allowance to be made by the seller for the injury to the land. * * * But the diminished value of the land is not the exclusive measure of relief for an injury in the nature of waste committed by a wrong-doer on the land of another. In many cases it would substantially exempt him from responsibility. Cutting a few trees on a timber tract, or taking a few hundred tons of coal from a mine, might not diminish the market value of the tract, or of the mine, and yet the value of the wood or coal, severed from the soil, might be considerable. The wrong-doer would, in the cases instanced, be held to pay the value of the wood and coal, and he could not shield himself by showing that the property from which it was taken was, as a whole, worth as much as it was before."—Worrall v. Munn, (1873) 53 N. Y. 185.

the value of the use of the land for the period during which he is deprived of such use.[4]

176. **Ejectment.**—In an action of ejectment, usually the most important right of the plaintiff, if he establishes his right to possession of the land, is the right to be put in possession. Further, he has a right to the net rental value or mesne profits of the land for the period of the wrongful occupation by the defendant, and interest thereon.[5] Mesne profits were formerly recovered only in a separate action subsequent to that of ejectment, and such is still the English rule;[6] but the usual American rule is that mesne profits may be recovered in ejectment.[7] Equity early granted compensation to an innocent occupant for reasonable improvements made by him and for care of the property; and courts of law, adopting the doctrine, now permit him to set off the reasonable cost of such improvements and care against the mesne profits.[8] The plaintiff may recover for waste committed by the defendant, if he specially pleads it.

177. **To What Time Damages Are Recoverable.**—Where the tort consists simply of one act, resulting in perma-

4—McGann v. Hamilton, (1889) 58 Conn. 69, 19 Atl. 376; McWilliams v. Morgan, (1874) 75 Ill. 473.

5—Credle v. Ayers, (1900) 126 N. Car. 11, 35 S. E. 128, 48 L. R. A. 751.

6—Doe v. Filliter, (1844) 13 M. & W. 47, 153 Eng. Repr. 20.

7—Woodhull v. Rosenthal, (1875) 61 N. Y. 382.

"The plaintiff must prove the value of the mesne profits, for the judgment in ejectment does not establish anything as to that."—Suth. Dam. (4th ed.) § 993. See also Willis v. Morris, (1886) 66 Tex. 628, 1 S. W. 799, 59 Am. Rep. 634.

"The general principle is that the plaintiff is entitled to recover all damages fairly resulting from his having been wrongfully kept out of possession."—Suth. Dam. (4th ed.) § 993. See also: Doe v. Perkins, (1848) 8 B. Mon. (Ky.) 198; Baltimore & O. R. Co. v. Boyd, (1887) 67 Md. 32, 10 Atl. 315, 1 Am. St. Rep. 362.

8—Jackson v. Loomis, (1825) 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; Ege v. Kille, (1877) 84 Pa. 333; Tiffany on Real Property, pp. 553-554. See Hodgkins v. Price, (1866) 141 Mass. 162, 5 N. E. 502.

nent injury to the plaintiff's land, there is no difficulty in assessing damages for such injury, once for all;[9] but, where there is a continuing nuisance or a continuing wrongful occupation of the premises, or a succession of trespasses, damages cannot be assessed to cover future losses, which have to be left for recovery in future actions.[10] Where the damage to plaintiff's land has been caused by a nuisance maintained by the defendant upon his own premises up to the time of the bringing of the action, it remains at all times within the power of the defendant to cease from his wrongdoing; and, as there is no presumption that he will continue the nuisance, damages cannot be assessed for any loss resulting from the maintenance of the nuisance after the commencement of the action.[11] If the nuisance is permanent, damages may be assessed, once for all.[12] Where an obstruction is permanent, damages may be assessed for past and future losses accruing therefrom. For instance, a company built a railroad, passing over a town's highway, obstructing the highway and destroying a bridge thereon. The railroad is a permanent structure, not liable to change. The injury is permanent, dependent upon no contingency of which the law can take notice. The damages are the value to the town of the property and rights, of which it has

9—Troy v. Cheshire R. Co., (1851) 23 N. H. 83, 55 Am. Dec. 177.

10—Savannah & O. Canal Co. v. Bourquin, (1874) 51 Ga. 378.

11—Joseph Schlitz Brewing Co. v. Compton, (1892) 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390, 34 Am. St. Rep. 92.

12—Troy v. Cheshire R. Co., (1851) 23 N. H. 83, 55 Am. Dec. 177.

"The question being as to what is a permanent nuisance, it was held that where it was of such a character that its continuance is necessarily an injury, and that when it is of a permanent character, that will continue without change from any cause but human labor, the damage is original, and may be at once fully estimated and compensated; that successive actions will not lie, and that the statute of limitations commences to run from the time of the commencement of the injury to the property."—Stodghill v. Chicago, B. & Q. R. Co., (1880) 53 Ia. 341, 5 N. W. 495, referring to Powers v. City of Council Bluffs, (1877) 45 Ia. 652, 24 Am. Rep. 792.

been deprived, for the use and purpose to which it is by law bound to apply them. Assuming the sufficiency of the old highway to meet the legal requirements and the public needs, this value is to be measured by the cost of new ground for a way, if it will be less costly, and more reasonable, having reference to the accommodation of the public by the highway, and the railway to procure new ground, rather than to build the highway over or under the railway, and the cost of the materials for the new road which will meet requirements as well as the old, and the expense of applying those materials to that use in the new road, and also the fund that will be required permanently in all future time to defray the increased expense of supporting and maintaining the new road in suitable repair, beyond what would have been necessary for the old road. These elements constitute the present value of the old road.[13] Where it is beyond the legal right of the defendant to cause the ill effects of his wrongdoing to cease, as in a case where he has trespassed upon the plaintiff's land and made excavations, it is evident that he cannot right the wrong without committing another trespass; and so the law permits the assessment of damages for past and future loss, all in one action.[14] But where the trespass is of a continuing nature, there is no more presumption that the defendant will persist in his wrongful conduct than there is in the case of a nuisance, so that damages are recoverable, in such a case, only to the date of the commencement of the action; prospective damages are not then recoverable, and, if the trespass is persisted in, the plaintiff may again bring an action.[15]

A more difficult question is raised where one act of the

13—Troy v. Cheshire R. Co., (1851) 23 N. H. 83, 55 Am. Dec. 177. Portions of the text above are quoted verbatim from the opinion.

14—Kansas Pacific Ry. v. Mihlman, (1876) 17 Kan. 224; Uline v. New York Central R. Co., (1886) 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661.

15—Holmes v. Wilson, (1839) 10 Adol. & E. 503, 113 Eng. Repr. 190, 37 E. C. L. 273.

defendant proximately results in a series of events detrimental to the plaintiff, owner of the land damaged. If defendant's act is not continuing, and is itself actionable independently of the question of damage, damages may be assessed for past and prospective losses, once for all, in one action.[16] In such a case, the plaintiff's right of action is grounded in the unlawful act of the defendant, and not in the damage that follows it. But where the very gist of the action is damage, as in a case wherein the defendant has legally done an act on his own land, which act has no illegal element unless it results in damage to the plaintiff, the latter cannot maintain an action unless he is damaged; and so, if the plaintiff's land is damaged a little now by such act and is damaged more as a later but proximate consequence of the same act, the plaintiff may maintain a new action each time damage accrues.[17] This is because the cause of action is, in this case, the damage, and not the act of the defendant in itself. Where this rule is applied, it becomes possible for an owner to sue for a subsidence of his soil occurring many years after an adjoining owner has removed supporting soil from his own premises. The inconvenience of such an application of the rule may seem great, but, as has been said in a famous case, "The inconvenience is as great the other way;" for, under a contrary rule, it would follow that, "on the least subsidence happening, a cause of action accrues once and for all, the statute of limitations begins to run, and the person injured must bring

16—Chicago, K. & W. R. Co. v. Willets, (1891) 45 Kan. 110, 25 Pac. 576; Loker v. Damon, (1835) 17 Pick. (Mass.) 284.

17—Darley Main Colliery Co. v. Mitchell, (1886) 11 App. Cas. 127; Savannah & O. Canal Co. v. Bourquin, (1874) 51 Ga. 378; Joseph Schlitz Brewing Co. v. Compton, (1892) 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390, 34 Am. St. Rep. 92; Bowers v. Mississippi & R. R. Boom Co., (1899) 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395. National Copper Co. v. Minnesota Mining Co., (1885) 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333, an important case, is distinguishable from the cases here discussed, as it is a case of admitted trespass, producing immediate damage.

his action, and claim and recover for all damage, actual, possible, or contingent, for all time."[18] Besides being unsound in principle, such a rule would compel the plaintiff, in some instances, to sue at a time when he had suffered little or no damage and when it would be impossible to say whether large damage or any damage at all would be added to that already suffered. In many cases, the owner would be practically deprived of his remedy, as in the case of a subsidence coming many years after the act of the defendant producing it; since he would have no right of action whatever until he had suffered actual damage, and, by the time he had suffered such damage, the statute of limitations might have run.

178. **Where Trespass Takes Something from the Land.** —Where the defendant has wrongfully severed and taken something from the realty, the owner may elect to do any one of the following: bring replevin to recover the thing back; bring trover to get the value of it as it stood at the time of the taking; waive the tort and sue in assumpsit for the amount of benefit actually received by the wrongdoer from the thing taken; waive all other rights of compensation and recover the mere rental value for the time the defendant has occupied the land, if he has occupied it for some time; or, where the injury is such as not to make it impracticable to restore the land to its former condition, the cost of such restoration is sometimes the measure of damages;[19] or the amount of diminution in value of the realty may be recovered.

18—Darley Main Colliery Co. v. Mitchell, supra.

19—Chicago, K. & W. R. Co. v. Willets, (1891) 45 Kan. 110, 25 Pac. 576. It is said in Park v. Northport Smelting Co., (1907) 47 Wash. 597, 92 Pac. 442, "We think the better rule is that where the wrong consists in the removal or destruction of some addition, fixture or part of real property, the loss may be estimated upon the diminution in the value of the premises, if any results, or upon the value of the part severed or destroyed, and that valuation should be adopted which will prove most beneficial to the injured

Where the destruction or taking of a thing from the land leaves the land as valuable as before, it is evident that the defendant cannot be heard to say that, although he has destroyed or taken away a thing of value, only nominal damages can be assessed. To uphold such a contention would be a mere travesty on justice. In such a case, the proper measure of damages is the value of the thing destroyed or taken.[20]

Where trees are wrongfully cut and taken from the land, the owner may of course replevy them or get their value by suing in trover or assumpsit; or he may recover the difference between the value of the land before the wrongful taking and the value after.[21] In determining the maximum amount of damages the owner can get, the question whether the particular trees taken are more valuable while standing than after being cut, is im-

party, as he is entitled to the benefit of his property intact." Cited in support are the following authorities: 28 Am. & Eng. Enc. of Law (2d ed.) 543; St. Louis, etc., Ry. Co. v. Ayres, (1900) 67 Ark. 371, 55 S. W. 159; Argotsinger v. Vines, (1880) 82 N. Y. 308; Dwight v. Railway Co., (1892) 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612, 28 Am. St. Rep. 563. The rule stated seems sound and consonant with justice. The owner, under any other rule, might not be so well off after recovering damages as before the trespass.

20—Louisville & N. R. Co. v. Beeler, (1907) 126 Ky. 328, 103 S. W. 300, 11 L. R. A. (N. S.) 930.

21—Bailey v. Chicago, M. & St. P. Ry. Co., (1893) 3 S. Dak. 531, 54 N. W. 596, 19 L. R. A. 653.

"In cases of injury to real estate the courts recognize two elements of damage: (1) The value of the tree or other thing taken after separation from the freehold, if it have any; (2) the damage to the realty, if any, occasioned by the removal. * * * A party may be content to accept the market value of the thing taken when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of the thing taken or destroyed after severance from the freehold, so as to secure compensation for the damage done to his land because of it, then the measure of damages is the difference in value of the land before and after the injury."—Parker, J., in Dwight v. Elmira, etc., R. Co., (1892) 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612. See Disbrow v. Westchester Hardwood Co., (1900) 164 N. Y. 415, 58 N. E. 519. See Suth. Dam. § 1019.

portant.[22] If the trees are nothing more than fully mature timber trees, ready for cutting, the most that the plaintiff can recover, according to the weight of authority, is the value of such trees at the time of their severance.[23] "The reason assigned for it [the rule] is that the realty has not been damaged, because, the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses."[24] But it has been held in New York that the plaintiff may recover also for the damage to the realty.[25] Where nursery trees are taken or destroyed, their chief or only value being for transplantation, and the soil not being damaged by their removal, the measure of damages is the market value of the trees.[26] Where growing timber is destroyed or cut, the case is different from that of matured timber. "Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damage, therefore, necessarily extends beyond the market value of the trees after separation from the soil, and the difference between the value of the land before and after the injury constitutes the compensation to which he is entitled. (Citing cases.[27]) In Wallace's Case, *supra*,[27] the court said: 'The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land, stripped of its trees may be valueless. The trees, considered as timber, may from their youth be valueless; and so the injury done to the plaintiff

22—See Foote v. Merrill, (1874) 54 N. H. 490, 20 Am. Rep. 151.

23—Dwight v. Elmira, etc., R. Co., supra.

24—Id.

25—Van Deusen v. Young, (1864) 29 N. Y. 9.

26—Birket v. Williams, (1888) 30 Ill. App. 451.

27—Chipman v. Hibberd, (1856) 6 Calif. 162; Longfellow v. Quimby, (1848) 33 Me. 457, 48 Am. Dec. 525; Hayes v. Railroad Co., (1890) 45 Minn. 17-20, 47 N. W. 260; Wallace v. Goodall, (1846) 18 N. H. 439.

by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil.' The same rule prevails as to shade trees, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock. * * * The current of authority is to the effect that fruit trees and ornamental or growing trees are subject to the same rule."[28]

It sometimes makes considerable difference whether the owner elects to sue in trover or in trespass *quare clausum fregit,* under the common law; not because the mere form of an action ever should be held to make a difference as to the measure of damages for the same offense, but because the substantive rights asserted in the two types of action are different. In trover, the owner is seeking to enforce his right to be compensated for the loss of the article destroyed or taken; in trespass *quare clausum fregit,* he attempts to enforce his right of compensation for damages to the realty. Even where the distinction between forms of action is abolished, the plaintiff may, in appropriate cases, assert either of the two rights. Where shade trees are cut, the measure of damages in trover is not usually so large as in trespass *quare clausum fregit,* for the value of the trees as severed timber is not usually equal to the amount of depreciation in value of the realty occasioned by their cutting; so that trespass is the action usually elected by the owner in such a case.[29] Very clearly, the amount of the resulting diminution in value of the land is the proper measure of damages for the destruction of an orchard.[30]

28—Dwight v. Elmira, etc., Co., (1892) 132 N. Y. 199, 30 N. E. 398, 15 L. R. A. 612.

29—See 15 L. R. A. 613, note. Wallace v. Goodall, (1846) 18 N. H. 439-456.

30—(Orchard trees.) "The trees taken up and removed from the place may have been and probably were of very little value, whereas in their growing state in the orchard they may have added con-

Where the defendant has destroyed or converted growing crops, the measure of damages, according to the great weight of authority, is the value of the crops at the time of the perpetration of the injury.[31] There are practical difficulties in the way of finding this value, and the evidence that is admissible for this purpose is such as to answer an inquiry of considerable scope. In order to prove the value of the growing crops destroyed or converted, it is permitted to show the kind of crops the land can produce, the average yield per acre on the land in dispute and on other similar lands in the immediate vicinity cultivated in like manner, the stage of growth of the crops at the time of the injury or destruction, the expenses of cultivating, harvesting, and marketing the crops, and the market value at the time of the maturity of the crop, or within a reasonable time after the injury or destruction.[32] The reason for admitting evidence of market value of the crop is not that the plaintiff can recover such value *in toto,* but that ascertaining the market value will aid in placing the value of the growing crops at the time of the injury.

Sometimes, however, the rule is laid down that, where crops are destroyed, the measure of damages is the difference between the market value of the land immediately before and after the injury.[33]

It has sometimes been contended, where lands having upon them growing crops are flooded, and the crops injured or destroyed, that the measure of damages is only

siderably to the value of the premises.''—Mitchell v. Billingsley, (1850) 17 Ala. 391.

31—Colorado, etc., Co. v. Hartman, (1894) 5 Colo. App. 150, 38 Pac. 62.

32—Lester v. Highland Boy Gold Mining Co., (1904) 27 Utah 470, 76 Pac. 341, 101 Am. St. Rep. 988, from which the rule as to evidence, above stated, is taken almost verbatim; Teller v. Bay & River Dredging Co., (1907) 151 Calif. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267.

33—Drake v. Chicago, R. I. & P. R. Co., (1884) 63 Ia. 302, 19 N. W. 215, 50 Am. Rep. 746.

the rental value of the land, but this contention is unsound and is not sustained.[34]

Where a mineral is wrongfully taken from the land, the usual measure of damages is the value of the mineral in place at the time of the beginning of the operation of mining, in the absence of willfulness.[35]

In case of the wrongful destruction of a building on the land of the plaintiff, recovery of the actual value of the building is usually allowed;[36] although some courts lay down the rule that the measure of damages is the difference between the value of the realty as it was before the destruction of the building and after.[37] Perhaps it will usually make little difference which rule is applied; but, in some cases, the difference between the operation of the two rules would be very great. It has been held that the rule giving the amount of diminution in value of the realty should be applied only for the purpose of giving the owner fuller compensation for the loss.[38] It is the actual value of the building, and not its market value, that is taken as the measure of damages.[39] In arriving at such actual value, it is proper to take into account the original cost of the house, the cost of replacing it, and its age and depreciation in value.[40]

34—Folsom v. Apple River Log Driving Co., (1877) 41 Wis. 602. "The hay was partly grown when injured or destroyed, and it seems to us that the net presumed value of the hay, less its actual value, measured the actual damages sustained." This is perhaps not the clearest statement of the law, but it seems certain that the court is merely invoking the usual rule for cases of injury to crops. See also Benjamin v. Benjamin, (1843) 15 Conn. 347, 39 Am. Dec. 384.

35—Maye v. Yappan, (1863) 23 Cal. 306; Donovan v. Consolidated Coal Co., (1900) 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206; Keys v. Pittsburg & W. Coal Co., (1898) 58 O. St. 246, 50 N. E. 911, 41 L. R. A. 681, 65 Am. St. Rep. 754. See Martin v. Porter, (1839) 5 M. & W. 351, 151 Eng. Repr. 149, 17 E. R. C. 841.

36—Kent County Agricultural Society v. Ide, (1901) 128 Mich. 423, 87 N. W. 369.

37—Brinkmeyer v. Bethea, (1904) 139 Ala. 376, 35 So. 996.

38—Id.

39—McMahon v. City of Dubuque, (1898) 107 Ia. 62, 77 N. W. 517, 70 Am. St. Rep. 143.

40—Wall v. Platt, (1897) 169 Mass. 398, 48 N. E. 270.

179. **Removal of Lateral and Subjacent Support.**—Where the lateral or subjacent support of land is wrongfully removed, the amount of damages is found, not by computing the damage to a small strip directly affected, but by computing the diminution in value of plaintiff's whole tract.[41]

180. **Nominal Damages.**—Although the owner of land may suffer little or none from a trespass, he is entitled to nominal damages at least.[42] Where a trespass to realty is accompanied by no actual damage, it is nevertheless often of very great importance that the owner be entitled to maintain an action, in which he may get nominal damages, for the purpose of establishing his right not to have the trespass of the defendant repeated. In many instances, the only purpose of the plaintiff in bringing his action is to establish his title to the premises by a recovery of nominal damages.[43]

Where the trespass has resulted in no damage, but has been of positive benefit to the land, as in the case of the filling up of a low vacant lot by the trespasser, it has been held that the cost of restoring the lot to its former condition cannot be made the measure of damages, and that only nominal damages can be assessed.[44]

But where the defendant has entered and occupied the plaintiff's close, the damages are the value of the use of the property during the continuance of the trespass.[45]

181. **Remote and Uncertain Damages.**—Here, as in other fields, the requirements of proximity and certainty

41—Parrott v. Chicago Great Western Ry. Co., (1905) 127 Ia. 419, 103 N. W. 352.

42—Dixon v. Clow, (1840) 24 Wend. (N. Y.) 188. The owner may recover nominal damages where the trespasser has repaired the injury. Jewett v. Whitney, (1857) 43 Me. 242.

43—Webb v. Portland Cement Mfg. Co., (1838) 3 Sumn. 189, Fed. Case. No. 17,322.

44—Murphy v. City of Fond du Lac, (1868) 23 Wis. 365, 99 Am. Dec. 181.

45—McWilliams v. Morgan, (1874) 75 Ill. 473.

apply. Damages cannot be recovered for injuries that are remote results of the trespass upon the land or that cannot be proved, with a proper degree of certainty, to be proximate results of the defendant's wrong.[46] For instance, the plaintiff cannot recover for damage resulting proximately from his own neglect after the trespass; and he cannot recover for the expense of looking after the trespassers. The fact that, if the land had not been damaged by defendant, plaintiff might have divided it into lots and sold it for homes, has been held immaterial, on the ground that such damage is too remote and speculative.[47]

182. **Willfulness.**—If the trespasser has acted willfully, he is usually held liable for the value of any chattel he has made from anything he has wrongfully severed from the land and taken, without any allowance for his labor;[48] but this is not so, if he has acted mistakenly and not willfully.[49] In Wisconsin, there is also a statutory rule of damages, penalizing the willful cutting of timber;[50] but this rule is not construed as applying to *bona fide* purchasers of logs made from the timber taken.[51] Likewise, it has been held that a statutory high measure of damages to penalize the cutting of another's timber, does not apply to a mistaken cutting.[52]

46—Longfellow v. Quimby, (1848) 29 Me. 196, 48 Am. Dec. 525.

47—Stonegap Colliery Co. v. Hamilton, (1916) 119 Va. 271, 89 S. E. 305, Ann. Cas. 1917 E 60.

48—White v. Yawkey, (1896) 108 Ala. 270, 19 So. 360.

49—Id.

50—In Wisconsin, the statutory rule is that the highest market value of logs wrongfully cut by defendant, "in whatsoever place, shape, or condition, manufactured, the same shall have been at any time before the trial, while in possession of the trespasser, or any purchaser from him with notice, shall be awarded to the plaintiff, if he shall succeed." Rev. Stat. 4269.

51—Wright v. E. E. Bolles, etc., Co., (1880) 50 Wis. 167, 6 N. W. 508.

52—Watkins v. Gale, (1851) 13 Ill. 152; Batchelder v. Kelly, (1839) 10 N. H. 436, 34 Am. Dec. 174.

Where a defendant has wrongfully and willfully occupied plaintiff's land and raised a crop thereon, the plaintiff may recover the value of the crop; and, if the value of the land is diminished, he may, of course, also recover for the diminution.[53]

183. **Aggravation.**—Wrongful acts done in connection with the trespass may be considered in aggravation. Manifestations of insult and other obnoxious conduct of the defendant, may properly cause a jury to regard the trespass as being aggravated. It has been held that even the malicious arrest of the owner of the land, in order to keep him out of the way during the trespass, is proper to be shown in aggravation of damages.[54]

184. **Mitigation.**—Genuinely compensatory elements of damage to realty cannot be mitigated by showing circumstances indicative of a good purpose on the part of the trespasser.[55] It is usually held that not even benefits by defendant's trespass can be set up in mitigation of actual damages.[56] Lack of willfulness and malicious intention will not mitigate purely compensatory damages,[57] although it prevents the assessment of exemplary damages.[58]

53—Kieman v. Heaton, (1886) 69 Ia. 136, 28 N. W. 478; Negley v. Cowell, (1894) 91 Ia. 256, 59 N. W. 48, 51 Am. St. Rep. 344.

54—Druse v. Wheeler, (1871) 22 Mich. 439. This might seem questionable, as false imprisonment would be ground for a different and separate action.

55—Bliss v. Ball, (1868) 99 Mass. 597, holding that the fact that plaintiff's shade trees, destroyed by defendant, caused defendant's house to be damp and unhealthy, could not be shown in mitigation.

56—"The rule is that a trespasser cannot, in any event, when compensation is sought for his trespass, be heard to say in defense, or even in mitigation, that he has really benefited the plaintiff by his wrongful acts; he cannot thrust benefits upon the landowner and then set up the benefits in reduction of the damage caused by these acts."—Pinney v. Town of Winchester, (1910) 83 Conn. 411, 76 Atl. 994.

57—Hazelton v. Week, (1880) 49 Wis. 661, 35 Am. Rep. 796.

58—Adams v. Lorraine Mfg. Co., (1908) 29 R. I. 333, 71 Atl. 180. The mere fact that a trespass

CASE ILLUSTRATIONS

1. Defendant wrongfully entered plaintiff's land and made deep excavations on about one-fourth acre, out of a tract of six or seven acres. Plaintiff may recover for his loss to the entire tract; and he may recover his entire loss in one action, such loss being the depreciation in the market value of his land, caused by the injuries.[59]

2. Defendants unlawfully built a dam and dug a trench on the premises of plaintiffs. "The plaintiffs could at any time have removed the dam and filled up the trench. * * * The defendants could not have entered to do either without being guilty of another trespass. The damages which the plaintiffs were entitled to recover, therefore, were the expenses of removing the dam and filling up the trench, and of restoring the premises to their former condition, and the loss of the use of them during the time which this would reasonably require."[60]

3. In November, defendants wrongfully removed portions of a stone wall enclosing plaintiff's land. The breaches were not repaired by plaintiff till after the middle of the succeeding May. In the meantime, the cattle of plaintiff and others passed into the close and fed upon the grass, injuring plaintiff's hay crop. Plaintiff can recover for the cost of repairing the wall, but not for the injury to the hay.[61]

4. Plaintiff had an easement to run a water pipe through defendant's land. Defendant cut plaintiff's water pipe and stopped his supply of water. Plaintiff was without water for some time, and then went to the expense of procuring a supply from another source. Defendant cannot complain of an instruction to the effect that plaintiff may recover the expense of repairing and relaying the pipe, the damage from the deprivation of water from his house for the time that elapsed, and the reasonable cost of supplying the water.[62]

to realty is willful, does not constitute proof that it is malicious, so as to justify the assessment of exemplary damages. Kieman v. Heaton, (1886) 69 Ia. 136, 28 N. W. 478.

59—Chicago, K. & W. R. Co. v. Willets, (1891) 45 Kan. 110, 25 Pac. 576.

60—Cavanagh v. Durgin, (1892) 156 Mass. 466, 31 N. E. 643.

61—Loker v. Damon, (1835) 17 Pick. (Mass.) 284.

62—Reynolds v. Braithwaite, (1890) 131 Pa. 416, 18 Atl. 1110.

5. Defendant encroached on land of plaintiff by the erection of a wall. "The plaintiff will recover, not the full value of the land, but the damage he sustains in being deprived of its use; and such damage will be limited to past time.[63]

6. Defendant, a canal company, by negligently permitting water to flow from the sides of its canal, flooded plaintiff's rice fields, preventing the use of the land. Plaintiff could recover a fair rental value of the land from the date of overflow to the bringing of the action. "Loss or damage accruing after the action could not be recovered in this suit." Plaintiff cannot recover for the outlay made by him for the cultivation of land which he knew to be submerged so that he could not cultivate it.[64]

7. Defendant threw stone and earth into the mouth of a small stream that usually discharged into a canal, whereby water was dammed and flowed back on plaintiff's land, so that six or seven acres could not be planted. The condition continued for three years. Held, in an action on the case, that the true measure of damages is "the fair rental value of the ground which was overflowed, and not the possible, or even the probable profits that might have been made, had the land not been overflowed. Such damages are too remote and speculative, depending on too large a variety of contingencies which might never have happened." [65]

8. Defendant wrongfully entered plaintiff's land and cut and removed timber. Held, that plaintiff is entitled to recover the value of the timber taken, but is not entitled to further damages by reason of the fact that the tree tops were left upon the land.[66]

9. Defendant trespassed on plaintiff's land and cut and carried away his trees. No willfulness of defendant is reported. "The true measure of damages is the amount of injury which the plaintiff has actually suffered from the whole trespass. If the trees were worth no more to the plaintiff to stand than to the defendant to be cut into timber at that time, their value as

63—McGann v. Hamilton, (1889) 58 Conn. 69, 19 Atl. 376. See also McWilliams v. Morgan, (1874) 75 Ill. 473.

64—Savannah & O. Canal Co. v. Bourquin, (1874) 51 Ga. 378.

65—City of Chicago v. Huenerbein, (1877) 85 Ill. 594, 28 Am. Rep. 626.

66—Nelson v. Big Blackfoot Milling Co., (1896) 17 Mont. 553, 44 Pac. 81.

timber, with the reasonable expense of cutting deducted, was the measure of the injury which was done to the plaintiff by cutting them." It was further held erroneous to allow the plaintiff to recover a verdict which included the value added to the timber by the defendant's labor.[67]

10. Defendant's cattle, horses, and sheep destroyed plaintiff's growing crops of peas, oats, and corn. Held: in order to arrive at the measure of damages, it is proper to admit testimony of the plaintiff, a farmer usually growing such crops, as to the value of the crop he would have had but for the trespass and the value of the crop he did have.[68]

11. Defendant inadvertently mined coal underlying plaintiff's land. Plaintiff is entitled to the value of the coal at the pit mouth, less the cost of carrying it there from the place where it was dug, allowing defendant nothing for the digging.[69]

12. Defendant, in good faith, mined coal under plaintiff's land. The measure of damages is the value of the coal in place at the time it was mined. "The severing, removing, screening, and marketing the coal should be treated as one continued transaction, and the defendant charged with its value at the time he began to mine it." Its quality, thickness, and situation with reference to mining and marketing facilities, must be considered; and doubtless other circumstances.[70]

13. Defendant, in working his coal mine, broke through the barrier, and worked the coal under plaintiff's land, and raised it for purposes of sale. Held, in trespass, that the measure of damages is the value of the coal so raised, without deducting the expense of getting it.[71]

14. A trespassed upon B's mining claim, taking away gold-bearing earth. The trespass was not willful or with malicious intent. Action is brought for the injury to the land itself. "The proper measure of damages, in a case like the present, is the value

67—Foote v. Merrill, (1874) 54 N. H. 490, 20 Am. Rep. 151.

68—Seamans v. Smith, (1866) 46 Barb. (N. Y.) 320.

69—Donovan v. Consolidated Coal Co., (1900) 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206.

70—Keys v. Pittsburg & W. Coal Co., (1898) 58 O. St. 246, 50 N. E. 911, 41 L. R. A. 681, 65 Am. St. Rep. 754.

71—Martin v. Porter, (1839) 5 M. & W. 351, 151 Eng. Repr. 149, 17 E. R. C. 841.

of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel."[72]

15. Agents of defendant entered plaintiff's home at an open door, and changed the old gas meter for a new one. Plaintiff can get nominal damages only.[73]

16. Defendant gas company's agents broke open plaintiff's cellar door and took out a meter belonging to defendant. "Merely nominal" damage was done to the lock and door. A verdict for $150 is not excessive, even for purely compensatory damages. "Compensatory damages embrace the determination of the extent of the injury, insult, invasion of the privacy, and interference with the comfort of the plaintiff and his family."[74]

17. Plaintiff owned the fee of a street. Defendant city's right in the street was an easement. Defendant graded the street. Plaintiff can recover only nominal damages.[75]

18. Defendant, in possession of plaintiff's land, under a *bona fide* claim of title, cut plaintiff's trees, and made them into rails, which he used in fencing the land from which they were cut. Plaintiff can recover nominal damages only.[76]

19. Defendants prevented plaintiff from exercising his rights under an easement to have a certain supply of water flow from defendants' land to plaintiff's land. Being deprived of his water supply, plaintiff made large expenditures in searching for and developing water. Held, that such expenditures are not proper elements of damage. "There was no showing that the improvements varied the difference in the value of the land with and without the water or the difference in the rental value."[77]

20. Plaintiff, in possession of a residence, by virtue of her right as widow, was wrongfully expelled. "The damages which are to be allowed in cases of this character are, first, any actual damages which may have resulted to the plaintiff because of her expulsion from the premises, including damages to her health, and those referable to pain and suffering, such as was the natural

72—Maye v. Yappen, (1863) 23 Cal. 306.

73—Fortescue v. Kings County Lighting Co., (1908) 112 N. Y. Supp. 1010, 128 App. Div. 826.

74—Reed v. New York & R. Gas Co., (1904) 87 N. Y. Supp. 810, 93 App. Div. 453.

75—Wood v. City of Williamsburgh, (1864) 46 Barb. (N. Y.) 601.

76—Clark v. Hart, (Miss. 1887) 3 So. 33.

77—Cheda v. Bodkin, (1916) 173 Cal. 7, 158 Pac. 1025.

and probable result of the wrongful act of the trespasser. In addition thereto, evidence that the trespass was willful, and all circumstances of aggravation attendant thereon, may be given in evidence, to be weighed by the jury in determining, not alone what would compensate the plaintiff for the injury that she has sustained, but for the purpose of allowing such damages as, in their judgment, would deter the wrongdoer from a repetition of the trespass.''[78]

78—Stevens v. Stevens, (1895) 96 Ga. 374, 23 S. E. 312.

CHAPTER XLI

Tortious Damage Pertaining to Personalty

185. **In General.**—A tortious injury pertaining to personalty may consist of a taking, a detention, or a complete destruction, of a chattel, or an infliction of damage upon it. A tort may result in either a permanent or a temporary loss of a chattel, and it may cause either a loss of the entire chattel or a mere diminution in its value. Permanency and completeness of loss coincide in a case in which the chattel has been completely destroyed or has been converted and retained; but, in the latter case, the owner may elect, by bringing replevin, to assert his right to have the chattel returned, thus showing his election not to consent to the permanency of the deprivation. The loss may be partial, but, at the same time, permanent, as where A has lamed B's horse permanently; since a portion of the horse's value is taken away for all time. The loss of a chattel may likewise be complete, but temporary; as in the case where A has wrongfully taken away B's horse and detained him for a month, at the end of which time A returns him and B receives him. The loss may be both partial and temporary, as where A, a bailee of B's horse, negligently feeds the horse too much corn, causing him to be sick for a short time, with no permanent bad effects. From all of this, it is clearly apparent that different measures of damages must apply to different cases of torts pertaining to chattels.

The usual actions for tortious injuries pertaining to personalty are trespass, trespass on the case, trover, and replevin; but the owner may waive the tort and sue in assumpsit, on the theory of a quasi-contractual relation.

Trespass *de bonis asportatis* is grounded merely upon a wrongful carrying away of the plaintiff's goods; trover and replevin are based upon a wrongful taking. In some instances, the owner may maintain any one of several forms of action. His choice of a remedy sometimes has some effect upon the measure of damages, for he is not asking for damages to compensate him for any elements of damage or injury that cannot be set up and claimed in the form of action he has elected. Some more or less arbitrary rules as to damages help to make the choice of a remedy of much importance in some instances; for instance, in trover, it is usually held that the plaintiff cannot recover exemplary damages,[1] but trespass is a form of action in which exemplary damages are very frequently allowed.

186. **Damages for Total and Permanent Loss of a Chattel.**—Where the defendant has converted the personalty of the plaintiff to his own use, to the total loss of the plaintiff, the usual measure of damages in trover is the total value of the thing converted, plus interest from the time of the conversion.[2] Only if the loss of the plaintiff is total is he entitled to recover the whole value of his chattel. If the chattel has been only damaged by the defendant's acts in connection with his conversion, so that the loss is only partial, and if the chattel has been received back by the plaintiff, the owner, it of course follows that the measure of damages cannot include the total value of the chattel. In such a case, the amount of damages to be assessed depends upon the amount of damage actually done.

187. **Value.**—In trover, where the loss of the converted article is complete, or where the owner elects to permit

1—Baldwin v. Porter, (1838) 12 Conn. 473.

2—Hurd v. Hubbell, (1857) 26 Conn. 389; Wehle v. Haviland, (1877) 69 N. Y. 448; John V. Farwell Co. v. Wolf, (1897) 96 Wis. 10, 70 N. W. 289, 37 L. R. A. 138.

possession to remain in the tortfeasor and to let him take title by virtue of the plaintiff's election and suit, the measure of damages is the value of the article at the time of the wrongful taking.[3] In order to get an understanding as to the method of arriving at such value, it is necessary that we consider the first great purpose of the action, which is to compensate the plaintiff for the loss which he has sustained. A market price, set by occurrences in exchanges and mercantile centers, may be the proper measure of compensation, and it may not. The fair cash value of shares of stock in a going corporation is usually fixed by the price at which they sell in the market, and not by the value of the property of the corporation.[4] Usually, the market price is the sum for which the owner can replace the chattel taken; but the market price is very far from being a universal measure of damages. It may and often does happen that the plaintiff, for some reason, can replace the goods for a sum less than the retail market price, in which event the value to him of the goods he has lost is such lesser sum. This is true in the case of the conversion of the goods of a merchant who is in a position to procure goods at wholesale, although the taking of the same goods, if owned by another person, might result in the assessment of the full retail market price as damages, because that would be the amount which the owner would, in such a case, be damaged.[5] In the usual

3—Hurd v. Hubbell, supra.

"The market value is at least the highest price that a normal purchaser not under peculiar compulsion will pay at the time and place in question in order to get the thing."—Holmes, C. J., in Bradley v. Hooker, (1900) 175 Mass. 142, 55 N. E. 848.

4—"As a rule, the fair cash value of shares having a market is best ascertained by finding the price at which they sell in the market. * * *

"Actual values are based upon existing states of fact, not upon hypotheses; and the actual value of shares in a going concern depends not only upon its property, but also upon its prospects, since shares both represent property and prospects."—Holmes, J., in National Bank of Commerce v. New Bedford, (1892) 155 Mass. 313, 29 N. E. 532.

5—Wehle v. Haviland, (1877) 69 N. Y. 448.

case, the value of the goods to the owner, and therefore his loss in the event of their conversion, is the amount it would cost him to replace them with exactly similar goods, which is the market price at the time and place of conversion. There are, however, some cases in which the value of the chattel is clearly not the amount it would cost to purchase another like it on the market. The article may have a peculiar value to the owner, difficult to compute, but very much more than its original cost, its monetary value at the time of conversion, or the cost of replacement with a similar article. Indeed, in many instances, the article may have no market value and no value of any kind, except to the owner; but, under such circumstances, it is not to be supposed that the owner cannot get substantial damages.[6] Sentiment of the owner is to be accorded some consideration.[7] If the only or principal value of the article to the owner is, not its market value, but its peculiar value to him, he is not restricted to the market value, and may recover such peculiar value, which is, of course, from the nature of the case, somewhat difficult to estimate. The loss of an old article is often a much greater loss than would result from a taking of money in an amount equal to its market value; for difficulty and expense of replacement by another article, perhaps new, must be considered.

Where defendant has converted plaintiff's household goods or clothing, the measure of damages is not the mere amount for which plaintiff could have sold the goods in the market, as this amount would often be very inade-

6—"Suppose a rod of railway track, or a shade tree, or a fresco painting on the walls or ceiling of a house, or a bushel of corn on the western plains, should be destroyed, could there be no recovery for these articles simply because there might be no actual market value for the same?" Atchison, T., etc., R. Co. v. Stanford, (1874) 12 Kan. 54, 15 Am. Rep. 362. See also Sinclair v. Stanley, (1885) 64 Tex. 67.

7—Jacksonville, etc., Ry. Co. v. Peninsular, etc., Co., (1891) 27 Fla. 1, 9 So. 661, 17 L. R. A. 33; Bateman v. Ryder, (1901) 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910.

quate; but the true measure is plaintiff's actual money loss, with due consideration of all circumstances resulting from the loss of his property, but not including any sentimental or fanciful value placed upon it by plaintiff.[8]

Where defendant has converted plaintiff's stereotype plates, used and possible of being used for the printing of labels and advertisements in plaintiff's business, it is very clear that any kind of market value may be a very inadequate measure of the plaintiff's damage. In such a case, the plaintiff should allege and prove, and may recover for, any unusual damage which he may have suffered, such as obstruction of his business, if it be a proximate result of the wrong.[9]

Because the plaintiff can, unless the convertor has changed the nature of the chattel, replevy it, even if the wrongdoer has added value to it, it is sometimes held that, if he elects to bring trover, the owner may recover the increased value of the chattel;[10] but some holdings are otherwise.[11] Willfulness is, according to the weight of authority, important in these cases. If there be no willfulness, it is usual to permit recovery of only the value of the chattel at the time of the conversion.[12]

Where the market value fluctuates, a number of courts have allowed the highest market value between the time of the conversion and the time of the trial.[13] This rule, in jurisdictions where applied, is of great importance in

8—Barker v. Lewis Storage, etc., Co., (1905) 78 Conn. 198, 61 Atl. 363, 3 Ann. Cas. 889; Denver S. P. & P. R. Co. v. Frame, (1882) 6 Colo. 382; Fairfax v. New York Central, etc., R. Co., (1878) 73 N. Y. 167, 29 Am. Rep. 119.

9—Stickney v. Allen, (1858) 10 Gray (Mass.) 352.

10—Silsbury v. McCoon, (1850) 3 N. Y. 379, 53 Am. Dec. 307.

11—Dresser Mfg. Co. v. Waterston, (1841) 3 Metc. (Mass.) 9.

12—Winchester v. Craig, (1876) 33 Mich. 205; Beede v. Lamprey, (1888) 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426.

13—Wilson v. Mathews, (1857) 24 Barb. (N. Y.) 295; Kid v. Mitchell, (1818) 1 Nott & McCord (S. Car.) 334, 9 Am. Dec. 702; Fish v. Nethercutt, (1896) 14 Wash. 582, 45 Pac. 44, 53 Am. St. Rep. 892.

cases of the conversion of stocks, bonds, and securities, since the fluctuation in their values is often very marked; and many of the cases in which it has been employed are of this kind.[14] The highest market value of securities between the time of the conversion and a reasonable time after notice of the conversion is sometimes said to be the proper measure of damages.[15] The assessment of damages covering the highest market value of a chattel between the conversion and the trial, provided suit is commenced and prosecuted within a reasonable time, is authorized by statute in some states.

It is very difficult to arrive at a satisfactory rule as to the measure of damages for the conversion of chattels that constantly fluctuate in value. The owner may be and often is damaged to a far greater amount than the value of the chattel at the time of the conversion. At the time of the trial, it is possible to look back over the interim that has passed since the conversion and to know with certainty what the highest intermediate value has been. Since, if the plaintiff's ownership had not been interfered with, he would, at one time in the interim, have had a chattel worth such highest value, it can be said that he has lost this value and not merely the value at the time of conversion, if it exceed the latter. Of course, it is argued that it is not certain that the plaintiff would have disposed of the chattel at this highest value, so that it is uncertain whether he has really lost this amount; to which it is proper to reply that money terms are used merely as a convenient and necessary means of expressing the value of a chattel, and that the plaintiff has truly lost this highest market value of the chattel, whether he can prove with certainty that he would have sold it at this

14—This rule as to stocks, etc., is known as "the New York rule." See Baker v. Drake, (1873) 53 N. Y. 211, 13 Am. Rep. 507; and Wright v. Bank of the Metropolis, (1888) 110 N. Y. 237, 18 N. E. 79, 1 L. R. A. 289, 6 Am. St. Rep. 356.

15—Dimock v. United States National Bank, (1893) 55 N. J. L. 296, 25 Atl. 926, 39 Am. St. Rep. 643.

figure or not. The rule of highest intermediate value of the chattel, especially as to stocks and securities, with their greatly fluctuating values, has much of logic to support it, although only a few courts have followed it.

It is manifestly impossible to prove with equal exactness and certainty the value of all kinds of commodities. While, in the case of goods, stocks, or bonds, sold in an open market, where all buyers and sellers may come together, it is comparatively easy to determine the value at any specified time, it is not possible to settle so easily upon the value of an article not of a class commonly sold in the open market; and so, in such cases, it becomes necessary to admit the testimony of witnesses as to what the property would probably bring under different conditions named, having due regard to the uncertainty of getting a purchaser at the highest possible price. For instance, where defendant converted plaintiff's old mahogany lounge, it was proper to admit testimony that, on the date of the conversion, it was worth $50 to any one that liked antique furniture, but that, to a person who did not care for antique furniture, or at auction, it would probably bring only $15 to $20.[16]

188. **Losses Less than a Permanent and Total Loss of the Chattel.**—Compensation being the principal purpose of the law of damages, and a loss of part being less than a loss of the whole, it follows that the measure of damages is not the same in the case of a temporary or a partial loss, as in that of a permanent and total deprivation.

16—"In the stock exchange buyers and sellers are brought together in a focus, with the result that there is no danger of missing the highest price by the accident of missing the man who would give it. Even if at a given moment there is no buyer of the class that would most desire a certain stock or bond, there is an organized public ready to buy upon the anticipation that such a buyer will be found, and regulating the price which it will pay, more or less by anticipation. There is no such focus for old furniture. The answer very properly recognized the uncertainty of encountering a pur-

Where injury is inflicted upon plaintiff's chattel, not destroying it, but diminishing its value, the plaintiff is entitled to compensation for the diminution in value.[17] Furthermore, if the plaintiff has made reasonable expenditures for the purpose of avoiding the consequences of the defendant's wrong, he can recover for such expenditures;[18] and he is entitled to compensation for the use of the property during the time reasonably necessary for the repairing of the injury.[19] But he is not usually entitled to have the value of the use measured by the amount of prospective profits which might have been obtained from a continued use of the chattel.[20] The rule of certainty often stands in the way of the assessment of damages for the loss of such prospective profits; and, besides, there seems to be no good reason why the payment of a mere rental value is not a sufficient compensation for the loss of the use of the chattel, in most instances in which mere interest on the value of the chattel is not sufficient.[21]

In replevin,[22] the plaintiff, if he establishes his right to the chattel in question in the suit, has a right to keep the thing already in his possession by virtue of the writ of

chaser who would give the reasonably possible highest price, and named an alternative sum. In a case like this market value oscillates within limits, because, in the absence of a balance wheel like the stock exchange, it cannot be assumed with regard to a single object and a single sale that the element of accident is eliminated, and that the most favorable purchaser will be encountered.''—Holmes, C. J., in Bradley v. Hooker, (1900) 175 Mass. 142, 55 N. E. 848.

17—Gillett v. Western R. Corporation, (1864) 8 Allen (Mass.) 560.

18—W. K. Syson Timber Co. v. Dickens, (1906) 146 Ala. 471, 40 So. 753; Mitchell v. Burch, (1871) 36 Ind. 529; Gillett v. Western R. Corporation, (1864) 8 Allen (Mass.) 560.

19—Donahoo v. Scott, (Tex. Civ. App. 1895) 30 S. W. 385; Wright v. Mulvancy, (1890) 78 Wis. 89, 46 N. W. 1045, 9 L. R. A. 807, 23 Am. St. Rep. 393.

20—Wright v. Mulvaney, supra, a case of injury to a fishing-net.

21—See Allen v. Fox, (1873) 51 N. Y. 562, 10 Am. Rep. 641.

22—The old action of detinue, for the wrongful detention of chattels, need not be considered here, as it is obsolete, and besides is of little historical importance in the development of the law of damages.

replevin, and to recover damages for its wrongful detention; and likewise the defendant, if the plaintiff fail to establish his title, can get the chattel back, together with damages for the plaintiff's wrongful detention of the property under the replevin writ during the suit.[23] In any proceeding for damages for detention of personalty, compensation for the detention is measured by the value of the use of the chattel. If the thing taken consists of mere merchandise, grain, or anything useful only for sale or consumption, the value of the use is the interest on the value of the chattel, plus depreciation in value; for the owner is ordinarily reimbursed fully by such compensation, since he could simply go into the market and replace the thing taken and thus make good his loss.[24] But sometimes this would not necessarily be adequate compensation, and this is held to be the case where the article is one that has a value principally for use,—such property as horses, machinery, and vehicles.[25] If defendant made no use of the property, the amount of depreciation that would have been caused by such use must be deducted from the rental value, as the defendant, if he had rented

23—Allen v. Fox, (1873) 51 N. Y. 562, 10 Am. Rep. 641; Fisher v. Whoollery, (1855) 25 Pa. 197; Duroth Mfg. Co. v. Campbell, (1914) 243 Pa. 24, 89 Atl. 798.

24—Where one wrongfully seizes the stock of goods in another's store, without malice, but redelivers the goods to the owner before action is commenced, compensation for the detention includes the following: "First, the plaintiff should recover interest on the value of the goods seized, from the time of the seizure until the same were delivered to the plaintiff, or to his assignee; or, at the option of the plaintiff, in lieu of such interest, he may recover as damages the value of his business during the same time; and, second, for any depreciation in the value of the goods during the same time; and, third, for any expenses the plaintiff was put to in obtaining a return of the goods." This latter item includes costs paid on illegal judgments, and sheriff's fees charged on illegal executions. Anderson v. Sloane, (1888) 72 Wis. 566, 40 N. W. 214.

See also McDonald v. Scaife, (1849) 11 Pa. 381, 51 Am. Dec. 556.

25—Allen v. Fox, (1873) 51 N. Y. 562, 10 Am. Rep. 641; Armstrong v. Philadelphia, (1915) 249 Pa. 39, 94 Atl. 455, Ann. Cas. 1917 B 1082.

the property of the plaintiff, would not have had to pay for depreciation in addition to the rental value, rental including ordinary wear and tear.[26]

The amount of damages for detention of personalty should bear some reasonable proportion to the value of the goods.[27]

When a conversion is mentioned, one naturally thinks of a loss of the entire value of the chattel. A conversion is, in theory, a complete deprivation. But the general rule that the owner may recover the entire value of the chattel at the time of the conversion, is to be applied unreservedly only in cases wherein the actual loss is not lessened by such surrounding circumstances as the law takes into account in modification of the operation of the general rule. If the conversion has resulted in a mere diminution in value of the chattel, and the owner has accepted it when returned by the wrongdoer, the return and acceptance must be considered in mitigation of damages, of which the usual effect would be to place the amount of the verdict at about the amount of the diminution in value.[28] Likewise, if the conversion has resulted in a mere deprivation of the use of the chattel for a time, and the owner has accepted it back at the hands of the wrongdoer, these circumstances must be considered in mitigation of damages, which will ordinarily result in compensating the owner merely for the deprivation of the use.[29] Perhaps a better, as well as a bolder, way of stating these principles, than the usual statement, as above, in regard to mitigation, is the following: "If after conversion the property be restored before suit, damages for the deten-

26—White v. Sheffield, etc., St. R. Co., (1889) 90 Ala. 253, 7 So. 910; Peerless Machine Co. v. Gates, (1895) 61 Minn. 124, 63 N. W. 260; Armstrong v. Philadelphia, supra.

27—Brunnell v. Cook, (1893) 13 Mont. 497, 34 Pac. 1015; Romberg v. Hughes, (1893) 18 Neb. 579, 26 N. W. 351; Armstrong v. Philadelphia, (1915) 249 Pa. 39, 94 Atl. 455, Ann. Cas. 1917 B 1082.

28—Lucas v. Trumbull, (1860) 15 Gray (Mass.) 306.

29—King v. Franklin, (1902) 132 Ala. 559, 31 So. 467.

tion only can be recovered."[30] Of course, a wrongdoer cannot force the owner to take back the chattel in mitigation of damages. When a conversion is once complete, the owner may elect, if he choose, to permit the wrongdoer to keep the property. The doctrine of mitigation of damages, in these cases, is founded upon the actual or implied assent of the owner to the return of the goods.[31] In some instances, the property, while in the hands of the wrongdoer, is seized by a third person, under an execution against the owner; and, since the owner has, in such a case, the benefit of the value of the property, the wrongdoer has the clear right to set up such seizure in mitigation of damages.[32] On the question whether a subsequent rightful execution in behalf of the wrongdoer will mitigate damages, there is a conflict of authority.[33]

189. "**Exemplary Damages** also may be allowed in cases where there have been particular circumstances of fraud, oppression, or wrong in the taking or detention of the property."[34]

30—This statement of the law is quoted with approval in Lazarus v. Ely, (1878) 45 Conn. 504, as is also the rule that "if the property for which the action is brought has been returned to and received by the plaintiff, it shall go in mitigation of damages," the court apparently taking the view that the two statements are, at bottom, really grounded in the same principle, or that they give the same net results. The Lazarus case quotes the above rule as to mitigation from Curtis v. Ward, (1850) 20 Conn. 204, which cites Pierce v. Benjamin, (1833) 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

31—Carpenter v. Dresser, (1881) 72 Me. 377, 39 Am. Rep. 337.

32—Sherry v. Schuyler, (1842) 2 Hill (N. Y.) 204; Ball v. Liney, (1871) 48 N. Y. 6, 8 Am. Rep. 511.

33—Lazarus v. Ely, (1878) 45 Conn. 504, holds that a subsequent rightful execution levied on the property in behalf of the wrongdoer, may be considered in mitigation. Contra: Ball v. Liney, (1871) 48 N. Y. 6, 8 Am. Rep. 511.

34—McDonald v. Scaife, (1849) 11 Pa. 381, 51 Am. Dec. 556. See also: Cable v. Dakin, (1838) 20 Wend. (N. Y.) 172; Armstrong v. Philadelphia, (1915) 249 Pa. 39, 94 Atl. 455, Ann. Cas. 1917 B 1082; Wiley v. McGrath, (1900) 194 Pa. 498, 45 Atl. 331, 75 Am. St. Rep. 709.

CASE ILLUSTRATIONS

1. Plaintiff's automobile was negligently struck and damaged by defendant's street car. The measure of damages is the difference in the value of the automobile just before and just after the injury.[35]

2. Defendant's street car, through negligence, struck and totally destroyed plaintiff's wagon. Plaintiff may recover its total value.[36]

3. Defendant struck plaintiff's team of young horses, causing them to run away. A load of wood was thereby thrown off plaintiff's sleigh, and his harness and sleigh were damaged. Plaintiff can recover for delay in getting to the place of destination and market, labor and trouble of reloading the wood in the snow, the time lost and expense incurred in making the repairs, and the injury to the team in causing it to run away, although the horses received no bodily injury, but were lessened in value only by acquiring the vicious habit of running away.[37]

4. A killed some of B's cows and wounded others. As to the wounded cows,—B may recover for the loss of milk while these cows were recovering.[38]

5. Defendant trespassed upon a boom of plaintiff, and cut and broke the fastenings of logs therein, causing the logs to escape. Plaintiff may recover for the property thereby lost or destroyed, and for the cost of watching the logs and preserving them. "It was plaintiff's duty to use all reasonable means to reduce the damage as much as possible, and the reasonable cost in so doing, constitutes a part of the reasonable recoverable damage." [39]

6. Defendant destroys plaintiff's property, which has no market value and cannot be replaced. The measure of damages is the loss to plaintiff.[40]

7. Defendant wrongfully destroyed plaintiff's glass picture,

35—Birmingham Ry., etc., Co. v. Sprague, (1916) 196 Ala. 148, 72 So. 96.

36—Roffmann v. Third Ave. Ry. Co., (1916) 157 N. Y. Supp. 877.

37—Oleson v. Brown, (1877) 41 Wis. 413.

38—Donahoo v. Scott, (Tex. Civ. App. 1895) 30 S. W. 385. However, the value of the use of a cow is not always held to be the value of her milk.

39—W. K. Syson Timber Co. v. Dickens, (1906) 146 Ala. 471, 40 So. 753.

40—Bateman v. Ryder, (1901) 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910.

painted by plaintiff. Held, that the measure of damages is the pecuniary loss suffered by reason of the breakage, which, in case of total destruction, is the market value of the article; and that plaintiff cannot recover the value of the broken picture to her individually as a design.[41]

8. Defendant converted and sold, at 26 cents per share, stock of plaintiff having no market value. Stock of the same company had, under exceptional circumstances, sold as high as 40 cents per share. Held that, in assessing damages, the jury, although not governed by the exceptionally high price of 40 cents, should consider it.[42]

41—Wade v. Herndl, (1906) 127 Wis. 544, 107 N. W. 4, 5 L. R. A. (N. S.) 855, 7 Ann. Cas. 591.

42—Goodall v. Clarke, (1910) 21 Ont. L. R. 614, 18 Ann. Cas. 605.

CHAPTER XLII

Nuisance

190. Special Damage Essential to Maintenance of Action.—A public nuisance is one that affects the public generally. A private nuisance is one that particularly affects an individual. The same nuisance may be both public and private, for it may both affect generally the public in the locality in which it exists and affect particularly one person. If a nuisance is entirely a public one, a private individual cannot maintain an action founded upon it. In other words, he must plead and prove that the nuisance has resulted in special damage to him; or, to express it still differently, that toward him the nuisance assumes the aspect of a private nuisance.[1] The mere fact that the plaintiff is a member of the public and is injured by the maintenance of the nuisance just as all other members of the public are injured, does not entitle him to maintain an action.

191. Elements of Compensation.—Where a nuisance is permanent, depreciation in the value of the plaintiff's property by reason thereof is an element of damage.[2]

1—Wesson v. Washburn Iron Co., (1866) 13 Allen (Mass.) 95. See also Ackerman v. True, (1903) 175 N. Y. 353, 67 N. E. 629.

Nuisances are also classified as nuisances per se and nuisances per accidens. The former are those things which, in all places, under all circumstances, are nuisances, as, for instance, houses of ill fame; the latter are those things which may, only under certain circumstances or in certain places, be nuisances, as, for example, pigsties and fertilizer works. See Woods v. Rock Hill Fertilizer Co., (1915) 102 S. Car. 442, 86 S. E. 817, Ann. Cas. 1917 D 1149.

2—Watts v. Norfolk, etc., R. Co., (1894) 39 W. Va. 196, 19 S. E. 521.

Where it is temporary, the plaintiff may recover for the diminution in rental value of the property during the continuance of the wrong.[3] It sometimes happens that the nuisance has caused illness or other personal injury to the plaintiff. Where this is so, this a proper element of damage.[4] Where a nuisance annoys and disturbs one in the possession of his property, rendering its use or occupation physically uncomfortable to him, damages are given for the annoyance and discomfort.[5]

"The cause of action, in case of an ordinary nuisance, is not so much the act of the defendant as the injurious consequences resulting from his act, and hence the cause of action does not arise until such consequences occur; nor can the damages be estimated beyond the date of bringing the first suit. * * * It has been held, however, that where permanent structures are erected, resulting in injury to adjacent realty, all damages may be recovered in a single suit. * * * But there is much confusion among the authorities which attempt to distinguish between cases where successive actions lie and those in which only one action may be maintained. This confusion seems to arise from the different views entertained in regard to the circumstances under which the injury suffered by the plaintiff from the act of the defendant shall be regarded as a permanent injury."[6]

3—Pritchard v. Edison Illuminating Co., (1904) 179 N. Y. 364, 72 N. E. 243.

4—Stremph v. Loethen, (Mo. App. 1918) 203 S. W. 238.

5—Ackerman v. True, (1903) 175 N. Y. 353, 67 N. E. 629.

6—Schlitz Brewing Co. v. Compton, (1892) 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390, 34 Am. St. Rep. 92, quoting as follows from Sedg. Dam. (8th ed.) § 94: "The chief difficulty in this subject concerns acts which result in what effects a permanent change in the plaintiff's land, and is at the same time a nuisance or trespass." The Schlitz case holds the reasonable view to be that it is unreasonable to assume that a nuisance or illegal act will continue forever, and holds that entire damages as for a permanent injury should be refused, and that only such damages should be allowed for the continuation of the wrong as accrue up to the date of the bringing of the action.

192. **Permanence of Nuisance.**—If a nuisance is of such a character that it may be abated, a suit in equity is ordinarily brought, in which an injunction is procured, prohibiting the defendant from longer maintaining the nuisance, and prospective damages are not assessed, as no future continuance of the wrong is contemplated. So it is also as to damages for a nuisance which the defendant is willing and ready to abate. In fact, according to the better view, damages cannot properly be assessed in an ordinary nuisance case, for losses expected to accrue from a future continuance of the nuisance, as it is not presumed that it will continue permanently.[7]

Where a nuisance is such that it must be permanent, however, both past and prospective damages are assessed. Such a case is that of a necessary public business giving rise necessarily to a nuisance, which must, in the nature of the case, be maintained permanently, authorized by the government and essential to the public welfare.[8]

Where defendant maintained a water tank and pumping-station, so located as to cause injury to plaintiff's property, and it was likely that the nuisance would remain permanently, it was held proper to assess damages for the permanent injury to plaintiff's property.[9]

Sometimes it happens that a nuisance which is temporary, in the sense that it can and will be abated, has already, at the time of the trial, given rise to damage of such a nature that it cannot be other than permanent. In such cases, damages for such permanent injury must be assessed, although the nuisance is abated.[10]

The fact that, though the injury is permanent, the de-

7—Benjamin v. Storr, L. R. 9 C. P. 400.

8—Schlitz Brewing Co. v. Compton, (1892) 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390, 34 Am. St. Rep. 92.

9—Central Consumers Co. v. Pinkert, (1906) 122 Ky. 720, 29 Ky. Law 273, 92 S. W. 957, 13 Ann. Cas. 105.

10—Niagara Oil Co. v. Ogle, (1912) 177 Ind. 292, 98 N. E. 60, Ann. Cas. 1914 D 67.

fendant could abate it if he desired, does not prevent the plaintiff from getting damages as for a permanent loss.[11]

193. **No Duty in Plaintiff to Mitigate Damage to His Property.**—Unlike the usual rule in torts and contracts to the effect that a plaintiff must do what is reasonable in order to mitigate the damage done by defendant's wrong, there is a rule that one suffering from a nuisance is not obliged to prevent ill consequences to his property.[12] This rule is clearly correct on principle. In the case of the ordinary tort or breach of contract, the defendant does his one wrongful act and ceases, and he usually then loses all control of the situation; and so the burden of preventing unnecessarily large damage is shifted to the plaintiff. In a nuisance case, the defendant, by maintaining his nuisance, continues to do wrong, and it continues within his power to prevent the accrual of further damage to plaintiff by simply discontinuing his nuisance. It is more within his power than within that of the plaintiff to put an end to the damage; in fact, the termination of the nuisance is usually in the exclusive power of the defendant. Another ground on which the same result may be reached in some cases is that plaintiff, having no control over the place where the nuisance is being maintained, is under no duty to minimize damage by abating the nuisance.[13]

11—Niagara Oil Co. v. Ogle, supra.

12—Niagara Oil Co. v. Ogle, (1912) 177 Ind. 292, 98 N. E. 60, Ann. Cas. 1914 D 67, quoting Wood, Nuisances (3d ed.) § 435, as follows: "It is the duty of every person or public body to prevent a nuisance, and the fact that the person injured could, but does not, prevent damages to his property therefrom is no defense either to an action at law or in equity. A party is not bound to expend a dollar, or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another."

13—Cumberland Grocery Co. v. Baugh's Administrator, (1913) 151 Ky. 641, 152 S. W. 565, Ann. Cas. 1015 A 130.

CASE ILLUSTRATIONS

1. Defendant maintained a fertilizer mixing plant near plaintiff's house, causing obnoxious odors, flying dust and grit to enter plaintiff's home. Held, that this is a private nuisance and a nuisance *per accidens*. Held also, that an allegation that plaintiff's mother and sister live with her and suffer from the nuisance, though not strictly necessary to the statement of plaintiff's cause of action, was not irrelevant thereto, for it tends to show the nature and extent of plaintiff's damages.[14]

2. A maintains near B's vacant lots a slaughter-house, which diminishes the value of the lots. B cannot procure an injunction, as he has an adequate remedy in an action at law, in which the measure of damages would be the diminution in the value of his lots.[15]

3. Defendant permitted filth to drain from his premises into those of plaintiff. Held, that plaintiff can recover for damage to walls and cellars, and also for rents lost.[16]

14—Woods v. Rock Hill Fertilizer Co., (1915) 102 S. Car. 442, 86 S. E. 817, Ann. Cas. 1917 D 1149.

15—Dana v. Valentine, (1842) 5 Metc. (Mass.) 8.

16—Jutte v. Hughes, (1876) 67 N. Y. 267. Contrast the facts here with those in Dana v. Valentine. The permanent maintenance of a slaughter-house diminishes the permanent value of neighboring lots. The permitting of filth to drain into plaintiff's premises does not give rise to a permanent condition, but only to a temporary condition, which must be abated; and so damages include only loss of rents, instead of diminution in value of the fee.

CHAPTER XLIII

Battery and Other Personal Injuries

194. **Elements of Compensation.**—Where the defendant has tortiously inflicted a personal injury upon the plaintiff, a jury should take into account the following heads of damage: "the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life."[1] As will be seen later, mental suffering also is often a proper element of damage. In any case, any one or several of these elements may be missing.

Where plaintiff has suffered permanent disfigurement as a result of the personal injury, his humiliation or mortification at the disfigurement is, according to the weight of authority, a recoverable element of damage.[2] Full redress would not be afforded if this element were omitted.[3]

1—Johnston v. Great Western Ry. Co., L. R. 2 K. B. 1904, 250.

2—The Oriflamme, (1875) 3 Sawy. 397, 2 Cent. L. J. 473, 2 Int. Rev. Rec. 237, 18 Fed. Cas. No. 10,572; Merrill v. Los Angeles Gas, etc., Co., (1910) 158 Calif. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Western, etc., R. Co. v. Young, (1888) 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320; Coombs v. King, (1910) 107 Me. 376, 78 Atl. 648, Ann. Cas. 1912 C 1121; Power v. Harlow, (1885) 57 Mich. 107, 23 N. W. 606; Patterson v. Blatti, (1916) 133 Minn. 23, 157 N. W. 717, Ann. Cas. 1918 D 63; Gray v. Washington Water Power Co., (1903) 30 Wash. 665, 71 Pac. 206. See note, Ann. Cas. 1918 D 65.

3—Ferguson, etc., Co. v. Good,

This would seem a rational and incontrovertible proposition, but a considerable minority of cases hold otherwise.[4] The ground upon which these minority holdings are sometimes based is that mental suffering of this character is too remote and too speculative, particularly where there is no malice.[5] It certainly is difficult to understand how the non-existence of malice can make a result remote or speculative. Probably these cases are really grounded in a desire of the courts to keep the amounts of verdicts in such cases within due bounds and especially to protect defendants from the establishing of "fanciful or fraudulent claims by testimony which it is impossible to contradict or impeach."[6]

In order to justify an award of damages as for a permanent injury, there must be reasonable certainty that the injury is permanent, and not a mere chance or probability that such is the case.[7]

One of the most obvious rights of the plaintiff is to recover for all expenditures made in a reasonable effort to effect a cure of the condition brought about by the wrongful conduct of the defendant. Recovery may be had for all such expenditures, no matter at what time made, up to the time of the trial. Plaintiff may introduce in evidence the fact that he has incurred doctor bills and drug bills in attempting to be cured since the date of

(1914) 112 Ark. 260, 165 S. W. 628.

4—Southern Pacific Co. v. Hetzer, (1905) 135 Fed. 272, 68 C. C. A. 26, 1 L. R. A. (N. S.) 288; Diamond Rubber Co. v. Harryman, (1907) 41 Colo. 415, 92 Pac. 922, 15 L. R. A. (N. S.) 775; Indianapolis, etc., R. Co. v. Stables, (1872) 62 Ill. 313; Chicago City R. Co. v. Anderson, (1899) 182 Ill. 298, 55 N. E. 366; Salina v. Trosper, (1882) 27 Kan. 544; Johnson v. Wells, (1870) 6 Nev. 224, 3 Am. Rep. 245; Linn v. Duquesne, (1903) 204 Pa. St. 551, 54 Atl. 341, 93 Am. St. Rep. 800.

5—Chicago, B. & Q. R. Co. v. Hines, (1891) 45 Ill. App. 299.

6—See Linn v. Duquesne, (1903) 204 Pa. St. 551, 54 Atl. 341, 93 Am. St. Rep. 800.

7—L'Herault v. Minneapolis, (1897) 69 Minn. 261, 72 N. W. 73; Carson v. Turrish, (Minn. 1918) 168 N. W. 349, L. R. A. 1918 F 154; Strohm v. New York, Lake Erie, etc., R. Co., (1884) 96 N. Y. 305.

the commencement of the action.[8] Likewise, plaintiff may introduce proof as to similar expenditures likely to be necessary in the future.[9]

Loss of wages and loss of earning power, elsewhere more fully treated,[10] constitute important elements of damage in many personal injury cases. What a plaintiff has been earning before the accident is often a safe basis for computing the amount of wages lost and the value of his earning power; [11] but, if the nature of his occupation is such as to render the value of his earning power uncertain and speculative, no good purpose can be served by admitting testimony as to his previous earnings.[12]

195. **Injuries to a Married Woman.**—As results of personal injury to a married woman, she herself may suffer certain losses, which figure as elements of damage in an action by her; and her husband may have his action for certain losses suffered by him as consequences of the injury to her.

Of course the wife, like any person suing for his own personal injury, can recover for physical pain, mental suffering, and impairment or disfigurement of her person.

The right of a married woman to recover on her own account for loss of her earnings is a matter depending largely upon the statutes. Of course, in the absence of a statute giving a married woman the right to earnings accruing from her own services, the common law prevails, the property right in her services belongs solely to her husband, and, on this theory, her husband, and not she, is financially damaged by her inability to work. Under a statute giving a married woman the right to

8—Sturm v. Consolidated Coal Co., (1910) 248 Ill. 20, 93 N. E. 345, 21 Ann. Cas. 99; Chicago City R. Co. v. Henry, (1905) 218 Ill. 92, 75 N. E. 758.

9—Chicago City R. Co. v. Henry, supra.

10—Chapter XVI.

11—Ehrgott v. Mayor, (1884) 96 N. Y. 264, 48 Am. Rep. 622.

12—Walsh v. New York, etc., R. Co., (1912) 204 N. Y. 58, 97 N. E. 408, 37 L. R. A. (N. S.) 1137.

receive her own earnings, it is held, very properly and logically, that a married woman has the right to sue for loss of her earnings in work other than the mere performance of her household duties or the performance of other work gratuitously for her husband. When the statute gives her this legal right to receive her earnings, it is clear that a deprivation of her earnings becomes, both actually and theoretically, a loss to her, and so should be held remediable at her suit.[13] For example, where a married woman conducts a boarding-house, a separate business of her own, from which she has an income, and her ability to conduct it is diminished and her business made less profitable by reason of a personal injury, she can recover damages, if she specially plead and prove such damage.[14]

Where a wife sues in her own right for personal injuries to herself, even if the husband be joined as a mere nominal plaintiff, she cannot recover for any loss of her labor that belongs to her husband;[15] but a married woman has such an interest in her own capacity to labor that she can, in her own right, recover for a diminution or loss of such capacity.[16]

Because a wife cannot recover for the loss of any of her labor legally belonging to her husband, it follows that, even where a statute enables a wife to recover for her earnings in a separate business or occupation, she cannot recover for loss of her regular services in her home; for these services still belong to her husband.[17]

In order to get substantial damages for loss of her earnings, a married woman must of course prove the

13—West Chicago St. R. Co. v. Carr, (1897) 170 Ill. 478, 48 N. E. 992; Boyle v. Saginaw, (1900) 124 Mich. 348, 82 N. W. 1057; Smith v. Chicago & A. R. Co., (1893) 119 Mo. 246, 23 S. W. 784.

14—Moran v. New York City Ry. Co., (1905) 94 N. Y. Supp. 302.

15—Earl v. Tupper, (1873) 45 Vt. 275.

16—Powell v. Augusta & S. R. Co., (1887) 77 Ga. 192, 3 S. E. 757; Jordan v. Middlesex, (1885) 138 Mass. 425.

17—Tuttle v. Chicago, R. I., etc., R. Co., (1876) 42 Ia. 518.

value of such services, with reasonable certainty, as in any other case.[18]

The husband has, as a general rule, the right to recover, as damages for the personal injury of his wife, compensation for loss of her services,[19] for the cost of her medical treatment,[20] and for loss of *consortium*.[21]

Statutes enlarging the wife's separate civil rights do not take away the husband's right to the wife's reasonable household services and *consortium*, and so do not deprive him of a right of action for their loss.[22]

Usually the only financially valuable services of a wife that are lost by her husband as a result of her personal injury are domestic services, for the loss of which the husband may unquestionably recover; but the fact that some of her services are rendered to her husband outside the household, does not prevent him from recovering for their loss, if he properly plead and prove the loss of such services. For instance, where the wife has been assisting her husband in his business up to the time of the injury, without any contract for pay for such services, deprivation of her services in his business is an element of dam-

18—Denver & R. G. R. Co. v. Young, (1902) 30 Colo. 349, 70 Pac. 688.

19—Washington & G. R. Co. v. Hickey, (1898) 12 App. Cas. (D. C.) 269; Metropolitan Street R. Co. v. Johnson, (1893) 91 Ga. 466, 18 S. E. 816; Southern Kansas Ry. Co. v. Pavey, (1896) 57 Kan. 521, 46 Pac. 969; Hopkins v. Atlantic & St. L. R. R., (1857) 36 N. H. 9, 72 Am. Dec. 287.

20—Hopkins v. Atlantic & St. L. R. R., supra.

21—Russell v. Corne, (1703) 2 Ld. Raym. 1031, 92 Eng. Repr. 185; Dix v. Brookes, (1716) 1 Strange 61, 93 Eng. Repr. 385; Kelley v. New York, N. H. & H. R. Co., (1897) 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397; Berger v. Jacobs, (1870) 21 Mich. 215; Hyatt v. Adams, (1867) 16 Mich. 180; Holleman v. Harward, (1896) 119 N. Car. 150, 25 S. E. 972, 34 L. R. A. 803, 56 Am. St. Rep. 672.

22—Kelley v. New York, N. H. & H. R. Co., (1897) 168 Mass. 308. "By marriage, both husband and wife take upon themselves certain different duties and obligations toward each other, in sickness and health, which it cannot be supposed that the legislature has intended wholly to uproot." Accord: Denver & R. G. R. Co. v. Young, (1902) 30 Colo. 349, 70 Pac. 688.

age to the husband, for which he has a right to be compensated.[23] It has been so held even under a statute declaring that the earnings and profits of a married woman accruing from a trade or business, or her services or labor, other than those for her husband or family, shall be her sole and separate estate.[24] This holding seems perfectly logical. Such a statute does not purport to make the wife's earnings in her husband's business her own property; and so the loss of her services, rendered for her husband, even outside the home, under no contract for remuneration, is her husband's loss.

Although a wife has already recovered in her own right, for personal injuries inflicted upon her, it is held that her husband may still maintain an action of his own

23—Georgia Ry., etc., Co. v. Tice, (1905) 124 Ga. 459, 52 S. E. 916, 4 Ann. Cas. 200; Citizens St. R. Co. v. Twiname, (1890) 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352.

24—"The husband was engaged in the millinery business, and his wife, by reason of their marital relations, devoted her energy and services to the business for the benefit of the husband without any contract or expectation of pay for her services, and she sustained an injury on account of the negligence of the defendant, and by reason of which the husband was deprived of her services in his business, which the wife was accustomed to perform, but was prevented from performing by reason of the injury. There might be circumstances existing which would entitle the wife, in an action for damages, to recover for the value of her own services, and especially this is true when the wife is not engaged in carrying on any trade or business on her own account, or performing labor for persons other than her husband, and, on the contrary, is voluntarily rendering service for the benefit of her husband, and he is entitled to recover as well in one class of services as another. In other words, the husband is entitled to recover for the damage sustained on account of the loss of the services of the wife, and the value of her services, and loss sustained by reason of her inability to perform them, must necessarily depend on the character and value of the services which she is capable to perform, and is accustomed to perform for the husband."—Citizens St. R. Co. v. Twiname, (1890) 121 Ind. 375, 23 N. E. 159, 7 L. R. A. 352, citing: Seitz v. Mitchell, (1876) 94 U. S. 580, 24 L. ed. 179; Ohio & M. R. Co. v. Cosby, (1886) 107 Ind. 32, 7 N. E. 373; Harrington v. Gies, (1881) 45 Mich. 374, 8 N. W. 87; Belford v. Crane, (1863) 16 N. J. Eq. 265, 84 Am. Dec. 155; Cregin v. Brooklyn Crosstown R. Co., (1878) 75 N. Y. 192, 31 Am. Rep. 459; 9 Am. & Eng.

for loss of *consortium* caused by the same injury.[25] Likewise, the wife's recovery for her injuries will not bar subsequent recovery by the husband for loss of her services.[26]

196. **When Damage Is the Gist of the Action.**—Negligence alone never constitutes a basis of recovery; and so, if the defendant has merely been negligent toward the person of the plaintiff, and his negligence has not brought about a battery or a personal injury or any other invasion of the plaintiff's legal rights, there can of course be no recovery. If A drive his automobile recklessly and negligently while passing B, without touching B or inflicting any injury upon him, B can prove no more than merely A's negligence without the completion of any technical wrong or the infliction of any damage. Where there is an actual battery, however, there can be a recovery, just as in the case of a mere assault, without proof of damage.[27] In the ordinary case of a negligent personal injury to a passenger on a railroad, or in any other action grounded in negligence, it becomes necessary to prove that the plaintiff has suffered damage as a proximate result of the negligence.[28]

Encyc. of Law (1st ed.) p. 817, § 8.

See 4 Ann. Cas. 205-209, note, "Damages for Loss of Earnings by Married Woman in Consequence of Personal Injuries," especially pp. 207-208, "Services Rendered Husband Outside of Household."

But see Bechtol v. Ewing, (1913) 89 O. St. 53, 105 N. E. 72, Ann. Cas. 1915 C 1183, allowing the wife to maintain a contract action for services rendered by herself for a third party with her husband's consent. This case, however, is distinguishable in two ways from the Twiname Case: first, it is a contract action brought by the wife with the express or implied consent of the husband; and second, the services in question were performed for an outside party and were not done in the home or in connection with the husband's business.

25—Kelley v. New York, N. H. & H. R. Co., (1897) 168 Mass. 308, 46 N. E. 1063, 38 L. R. A. 631, 60 Am. St. Rep. 397.

26—Southern Kansas Ry. Co. v. Pavey, (1896) 57 Kan. 521, 46 Pac. 969.

27—Singer Sewing Machine Co. v. Methvin, (1913) 184 Ala. 554, 63 So. 997.

28—Malcolm v. Louisville, etc.,

197. **Avoidable Consequences.**—The duty of the plaintiff to make reasonable efforts to avoid ill consequences of defendant's wrong, plays a very important part in cases of injury to the person. The plaintiff must, upon receiving an injury of this kind, do what is reasonable to avoid damage, as in a case of any other kind of injury. The most important part of the plaintiff's duty to avoid consequences is his duty to make a reasonable attempt to effect a cure by procuring such medical services as are reasonably necessary for that purpose. He cannot neglect his injuries and thus increase them and have larger damages assessed against the defendant.[29]

198. **Mitigation.**—The pecuniary loss of the injured person is not rendered less by the fact that he has an independent income, although, as to bodily suffering, the possession of an independent income may be considered; for his suffering may be greater or less according to the degree of poverty to which he is reduced by the injury.[30] Nor is the fact that the plaintiff has received a sum on a policy of accident insurance to be taken in mitigation of damages. Accident insurance paid for by the plaintiff is not for the benefit of the wrong-doing defendant.[31] Likewise, it is held that the fact that the plaintiff has medical attendance free of charge [32] or has a gratuitous continuation of his salary during disability,[33] does not mitigate damages, and is immaterial.[34] If beneficial relations with

R. Co., (1908) 155 Ala. 337, 46 So. 768, 18 L. R. A. (N. S.) 489, 130 Am. St. Rep. 52.

29—This portion of the subject is more fully treated in Chapter V.

30—Phillips v. London & S. W. Ry. Co., (1879) 5 C. P. D. 280, 49 L. J. C. P. 233, 44 L. T. 217.

31—Bradburn v. Great Western Ry. Co., (1874) L. R. 10 Ex. 1, 44 L. J. Ex. 9, 31 L. T. 464, 23 W. R. 48, 8 E. R. C. 439; Pittsburgh, etc., R. Co. v. Thompson, (1870) 56 Ill. 138.

32—City of Indianapolis v. Gaston, (1877) 58 Ind. 224.

33—Ohio, etc., Ry. Co. v. Dickerson, (1877) 59 Ind. 317.

34—See American note, 8 E. R. C. 442 et seq., where some of the cases herein mentioned, as well as others, are summarized.

third parties bring him such advantages, it is simply the good fortune of the plaintiff.

199. **Aggravation.**—In cases of personal injury, particularly those involving an assault and battery, many circumstances aggravate damages. Important circumstances in a case of assault and battery are the publicity of the wrongful act and the reputation of the defendant for wealth. Publicity adds to the wrong; and, since, if the defendant is reputed to be a wealthy man, his standing in the community is likely to be more imposing and his wrong therefore likely to carry more of sting, it follows that evidence of the defendant's wealth is admissible in aggravation of damages.[35]

200. **Exemplary Damages** may be recovered for a personal injury, as in other cases, if it is shown that the defendant acted maliciously or wantonly,[36] or, according to many holdings, if he acted with negligence so gross as to evince a wanton disregard of consequences. Probably questions of exemplary damages in personal injury cases most frequently arise when gross negligence is alleged, and, in many courts, gross negligence is held to be a ground for exemplary damages, if so gross as to amount to malice in law.[37]

201. **Discretion of the Jury.**—The elements of damage in a personal injury case are largely non-pecuniary, or, if indirectly pecuniary, not capable of very exact computation; and so the court is reluctant to interfere with verdicts as being excessive or inadequate.[38] Here, as

35—Draper v. Baker, (1884) 61 Wis. 450, 21 N. W. 527, 50 Am. Rep. 143.

36—Hanna v. Sweeney, (1906) 78 Conn. 492, 62 Atl. 785.

37—Exemplary damages allowed where gross negligence is shown: Louisville & N. R. Co. v. Eaden, (1906) 122 Ky. 818, 29 Ky. Law 365, 93 S. W. 7, 6 L. R. A. (N. S.) 581.

38—See Retan v. Lake Shore &

elsewhere, however, the court will set aside a verdict or diminish the amount thereof, if it appears clearly that it is so large or so small in comparison with the actual damage sustained and in consideration of the circumstances of the commission of the wrong as to indicate passion or prejudice on the part of the jury.[39]

202. **General and Special Pleading.**—In the case of a battery not alleged by the pleadings to be such as to be serious, the plaintiff must specially allege that he has suffered physical pain, in order to recover for such pain.[40] If a serious personal injury has been inflicted upon the plaintiff by the defendant, the former necessarily suffers physical pain and some of those disagreeable mental experiences known as mental suffering, wounded feelings, anger, and fright. Because these are sure and necessary results of the wrong, both the defendant and the court know of their existence, so that they need not be specially apprised of their infliction; and so plaintiff need not specially enumerate these elements in his pleadings.[41] The pleadings must, of course, show that the injury is serious, in order to dispense with the necessity of specially pleading such elements of damage.

There are numerous possible but not necessary proximate results of personal injuries. The plaintiff has been

M. S. Ry. Co., (1892) 94 Mich. 146, 53 N. W. 1094.

39—See voluminous note, "Excessiveness of verdicts in actions for personal injuries other than death," L. R. A. 1915 F 30, which includes personal injuries of every kind.

40—"Physical pain may be produced by a battery, but it does not necessarily follow from every battery. The act of violence may be so slight as not to produce any bodily pain and suffering whatever, and yet it would be actionable, for which general damages could be recovered."—Irby v. Wilde, (1907) 150 Ala. 402, 43 So. 574. See also Suth. Dam., 4th ed., § 421.

41—Chicago v. McLean, (1890) 133 Ill. 148, 24 N. E. 527, 8 L. R. A. 765. "There cannot be severe physical pain without a certain amount of mental suffering."

Contra as to mental suffering: Sloss-S. S. & I. Co. v. Dickinson, (1910) 167 Ala. 211, 52 So. 594, 2 JJ. dissenting.

prevented from earning money in his particular profession or business. According to one view, if he does not specially state in his pleadings what his business is and how much his loss of earnings, the defendant knows not the real nature or extent of the damage to the plaintiff by reason of his inability to perform his accustomed work, and so is not in a position to prepare a defense; and therefore it is usually required that the plaintiff specially plead the nature of profession, occupation, or business, and the amount of his loss by reason of his inability to attend to it.[42] According to another view, the plaintiff may recover for injury to his general earning capacity without specially pleading his occupation, and the defendant need not be specially notified of such injury, in the pleadings, it being sufficient to allege merely that the plaintiff has been rendered unable to pursue his accustomed occupation.[43]

In the case of a personal injury not so alleged as to indicate that it is very severe, it is not to be inferred from the mere general statement of the injury that the plaintiff has had to incur the expense incident to employing a physician or nurse or to residing in a hospital; and so all such expenses must be specially alleged.[44] If, however, the plaintiff alleges a very serious injury, it is only reasonable to suppose that he has incurred expenses for the purpose of applying curative measures, and so he may recover for these expenses even under a general allegation.[45]

42—Homan v. Franklin County, (1894) 90 Ia. 185, 57 N. W. 703; Carlile v. Bentley, (1908) 81 Neb. 715, 116 N. W. 772.

A mere allegation that plaintiff "has been permanently disabled from labor" was held insufficient to warrant recovery for loss of earnings. Coontz v. Missouri Pac. R. Co., (1893) 115 Mo. 669, 22 S. W. 572, 16 Am. Neg. Cas. 497.

43—Atwood v. Utah Light, etc., Co., (1914) 44 Utah 366, 140 Pac. 137; 13 Cyc. 187.

44—Central Georgia Power Co. v. Fincher, (1913) 141 Ga. 191, 80 S. E. 645; Blue Grass T. Co. v. Ingles, (1910) 140 Ky. 488, 131 S. W. 278; Suth. Dam., 4th ed. § 421.

45—Suth. Dam., 4th ed. § 421, citing Evansville, etc., R. Co. v.

In an action for negligent personal injury, it has been held that plaintiff can recover for loss of earning capacity as a school teacher and for money paid in an endeavor to have herself cured of the injuries, where she has specially pleaded and proven that she "was thereby rendered incapable of performing her duties of school-teaching, which she has pursued with great success, and for which she had been specially trained and educated," and further that "by reason of such injuries * * * she did necessarily lay out divers sums of money in and about endeavoring to have herself cured of her said injuries." [46]

203. **Evidence.**—On the measure of compensatory damages, only such evidence is admissible as will throw light upon the amount of actual damage suffered by the plaintiff. This would seem axiomatic, but many fruitless attempts are made to introduce irrelevant testimony for the purpose of "working on the feelings" of the jury.

In an action for negligent personal injury to plaintiff, testimony as to the number of persons in plaintiff's family, plaintiff's financial standing, and the circumstances of the parties, is irrelevant.[47] The fact that the plaintiff has a wife and three children is inadmissible in evidence.[48] The chief reason for this rule is that the recovery is legally for the direct benefit of the plaintiff

Holcomb, (1894) 9 Ind. App. 198, 36 N. E. 39, 14 Am. Neg. Cas. 517.

46—Ruff v. Georgia Southern, etc., Ry. Co., (1914) 67 Fla. 224, 64 So. 782, 5 N. C. C. A. 698.

47—Jones & Adams Co. v. George, (1907) 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285, citing: 1 Elliott on Evidence, § 178; Barbour County v. Horn, (1872) 48 Ala. 566; Chicago v. O'Brennan, (1872) 65 Ill. 160; Pittsburg, etc., R. Co. v. Powers, (1874) 74 Ill. 341; Joliet v. Conway, (1887) 119 Ill. 489, 10 N. E. 223; Youngblood v. South Carolina & G. R. Co., (1901) 60 S. Car. 9, 38 S. E. 232, 85 Am. St. Rep. 835 and note.

48—Jones & Adams Co. v. George, supra. See also: Pennsylvania R. Co. v. Roy, (1880) 102 U. S. 451, 26 L. ed. 141; Kansas City, etc., R. Co. v. Eagan, (1902) 64 Kan. 421, 67 Pac. 887; Carlile v. Bentley, (1908) 81 Neb. 715, 116 N. W. 772; and Pennsylvania R. Co. v. Books, (1868) 57 Pa. St. 339, 98 Am. Dec. 229.

only, and his damages are not, in contemplation of law, either increased or diminished by the existence of his family. It is further urged, in many of the cases, that the admission of such evidence needlessly and unduly excites the commiseration and sympathy of the jurors.[49]

204. **No Right of Action in Child for Personal Injuries Inflicted Before Its Birth.**—One of the strangest anomalies of the case law of our times is that a child injured and even permanently deformed by a negligent or willful wrong inflicted while the child is in the foetal stage, can maintain no action whatever against the wrongdoer.[50] A very square holding on this point is Allaire v. St. Luke's Hospital,[51] which is based upon such facts as to leave no doubt as to the intention of the court to deny flatly that a child ever has a right of action for injuries inflicted upon him before his birth. In this case, the plaintiff's mother, within a few days of her delivery, entered defendant's hospital as a patient. Through the negligence of the defendant, she was thrown to the floor of an elevator by projections in the elevator shaft. As a result, the plaintiff was permanently crippled. Through seemingly specious reasoning, the plaintiff was denied a right of action, the court saying: "That a child before birth is, in fact, a part of the mother and is only severed from her at birth, cannot, we think, be successfully disputed. The doctrine of the civil law and the ecclesiastical and admiralty courts, therefore, that an unborn child may be regarded as *in esse* for some purposes, when for its benefit, is a mere legal fiction, which, so far as we have been able to discover, has not been indulged in by the courts of

49—E. g., Pennsylvania R. Co. v. Books, supra; and Jones & Adams Co. v. George, supra.

50—Allaire v. St. Luke's Hospital, (1900) 184 Ill. 359, 56 N. E. 638, 48 L. R. A. 225, 75 Am. St. Rep. 176, 7 Am. Neg. Rep. 427, affirming 76 Ill. App. 441; Lipps v. Milwaukee Electric, etc., Co., (Wis. 1916) 159 N. W. 916, 13 N. C. C. A. 1113.

51—Supra.

common law to the extent of allowing an action by an infant for injuries occasioned before its birth. If the action can be maintained, it necessarily follows that an infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother pregnant with it. We are of opinion that the action will not lie." The Allaire Case seems a flagrant miscarriage of justice. There was negligence,—a violation of a duty of the defendant toward the unborn plaintiff. Defendant knew, or must have known, of the existence of the plaintiff. To say that the doctrine that an unborn child is *in esse* is a mere fiction, is to say what is manifestly not true. To say that this so-called fiction is indulged in only for the benefit of the child, is to invite the query, "In what way is the protection of the child's property rights more to his benefit than is the protection of his body?" and the further query, "Would it not be 'for its benefit' to indulge in the so-called fiction of its existence, in order to protect its right to a sound body?" As Mr. Justice Boggs says in his dissenting opinion, "Should compensation for his injuries be denied on a mere theory, known to be false, that the injury was not to his person but to the person of the mother?" The Lipps Case,[52] holding that no cause of action accrues to an infant *en ventre sa mere* for injuries received before it could be born viable, says: "Very cogent reasons may be urged for a contrary rule where the infant is viable, and especially so in cases where the defendant, being a doctor or a midwife, has negligently injured an unborn child. As to such cases we express no opinion."

205. **No Right of Action in Administrator or Relatives for Wrongful Death of Child from Injuries Received Before Birth.**—Likewise, it is held that, where the child, after birth, dies as a result of injuries inflicted upon him

52—(Wis. 1916) 159 N. W. 916, 13 N. C. C. A. 1113.

before birth, no action can be maintained by an administrator of the child.[53] Nor can an action be maintained by the parents, in such a case, for the wrongful death of the child.[54] A street railway company negligently injured a pregnant woman as she left its car, dragging her for some distance, and so injuring the unborn child that it died several months after its birth. It was held that the parents could not maintain an action for the wrongful death. This decision was put upon the ground "that the legislature could not have intended (in view of the law existing or declared at the time), where it used the terms 'persons so dying,' to include a person who died after birth from injuries received by its mother prior to its birth."[55] It may well be asked whether the injury is one simply to the mother alone, so as to exclude the operation of the statute.

Furthermore, it is held that a statute giving to the next of kin a right of action for wrongful death, does not give a right of action to the next of kin of a child that dies soon after and as a result of a premature birth induced by defendant's wrongful act.[56] A ceiling negligently maintained by the defendant fell upon a woman who was pregnant, causing premature birth and early death of the child. The father, as next of kin, brought an action

53—Dietrich v. Northampton, (1884) 138 Mass. 14, 52 Am. Rep. 242. The opinion in this case, written by the eminent Justice Holmes, has had a widespread influence in shaping the law on the whole subject discussed in this section. It should be noted, however, that the principal ground of the decision was that the statute on wrongful death did not include the case, and that the great jurist's remarks in regard to the possibility or impossibility of holding one liable to a child for a tort inflicted upon him before birth, were not necessary to the decision. Yet this case is solemnly and constantly cited to support every kind of proposition in denial of the right of the child, its parents, or its administrator, to sue for injuries inflicted before its birth.

54—Buel v. United Railways Co., (1913) 248 Mo. 126, 154 S. W. 71, 4 N. C. C. A. 129.

55—Id.

56—Gorman v. Budlong, (1901) 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629, 10 Am. Neg. Rep. 188.

for the wrongful death of the child. It was held that the action could not be maintained, the court saying: "In our opinion, one cannot maintain an action for injuries received by him while in his mother's womb; and consequently his next of kin, under the statute, cannot maintain an action therefor, and so the demurrer must be sustained on this ground."[57]

CASE ILLUSTRATIONS

See numerous case illustrations in Chapter IV, and also a few in Chapters V, VI, and VIII.

57—Gorman v. Budlong, (1901) 23 R. I. 169, 49 Atl. 704, 55 L. R. A. 118, 91 Am. St. Rep. 629, 10 Am. Neg. Rep. 188.

CHAPTER XLIV

Assault

206. **Nature of Wrong.**—An assault consists of an attempt or threat to commit a battery upon another, accompanied by sufficient overt acts to place him in reasonable fear of violence. An assault may or may not be accompanied by a battery. From the nature of the tort, neither contact nor damage is the gist of the action. In fact, if the assault is accompanied by contact of the defendant's person with that of the plaintiff, the case is no longer one of mere assault, but is one of assault and battery.

207. **Elements of Damage.**—In the case of an ordinary assault, the only damage usually suffered is that species of mental suffering known as fright, although humiliation and outraged feelings of the plaintiff sometimes figure in the case. Where the assault is with intent to commit rape, fear, humiliation, and shame, all constitute elements of damage. All of these elements may be classified under the general head of mental suffering. Because of the fact that contact and physical loss are not essential elements of an action for assault, we have here a clear case where damages for mental suffering are allowed without proof of any impact or physical loss. The right of action for assault exists, however, even without proof of any mental suffering. If plaintiff proves an assault, but proves no mental suffering or damage of any other kind, he has a right to nominal damages, as he has proven his right of action, of which the gist is not damage. On principle, there would seem to be no reason why a mere assault, unaccompanied by a battery should not be a basis of

substantial damages. In such a case, a technical wrong has been committed, and, even in the absence of physical injury, the plaintiff may have been done a very serious wrong and may have suffered very real damage. Some cases so hold,[1] but some hold *contra,* saying that, where no physical harm is done, only nominal damages are recoverable.[2]

CASE ILLUSTRATIONS

1. Defendant went to the home of plaintiff and her husband, where plaintiff was alone with her young children, and told her that he wanted her to move out, that he would help her to do so, and that he intended to burn the house. He pointed a gun at her, poured kerosene upon the side of the house, and scratched a match. Held, that this was an assault, and that plaintiff could recover substantial damages for her fright and anxiety.[3]

2. Defendant angrily pointed an unloaded gun at plaintiff, and snapped it two or three times. Held, that it was not error for the court to instruct the jury to consider, in assessing damages, the effect that the finding of light or trivial damages would have to encourage disturbances and breaches of the peace.[4]

1—Kline v. Kline, (1902) 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397; Small v. Lonergan, (1909) 81 Kan. 48, 105 Pac. 27, 25 L. R. A. (N. S.) 976.

2—Shaffer v. Austin, (1904) 68 Kan. 234, 74 Pac. 1118.

3—Kline v. Kline, (1902) 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397.

4—Beach v. Hancock, (1853) 27 N. H. 223, 59 Am. Dec. 373.

CHAPTER XLV

Slander and Libel

208. **In General.**—Defamation, if oral, is slander; if written, libel. The direct damage resulting from defamation is injury to reputation.[1] If the rules of the law of slander and libel had been laid on a rational, and not an arbitrary, basis, we might have had the two subjects treated largely, if not entirely, as one; and a few broad general principles would then have governed the whole subject of defamation.[2] The courts might very logically have inquired, "under the rule of certainty and proximate cause, into the effect of the words spoken;"[3] but, instead, they have laid down the rule that certain kinds of statements, if written, are libelous *per se,* and that certain classes of oral utterance, classes marked off on different lines, are slanderous *per se.* This arbitrary differentiation between slander and libel, which is treated

1—"The character of a man strictly signifies what he is in himself, independently of the opinion others may entertain of him. When, therefore, we speak of defamation of character, we use terms inaccurately. But the reputation of a man depends wholly upon the estimation in which others hold him, and may therefore be injured by defamation. The remedy for such injury is by an action on the case, because the thing affected, being intangible, cannot be the subject of direct violence. Slander may be either spoken or written. In the latter case, it is called libel. In either case, the words must be both false and malicious, in order to constitute a civil injury."—Walker's American Law (11th ed.), p. 575. Although the above placing of libel as a class of slander might commend itself to us on principle if we could deal with the matter unhampered by a mass of law on the subject, the student will learn, from the sections that follow, that libel is treated today as being somewhat more than a mere department of slander.

2—See Colby v. Reynolds, (1834) 6 Vt. 489, 27 Am. Dec. 574.

3—Sedg. El. Dam. (2d ed.) p. 164.

in the sections following, has led to much of difficulty and confusion.

209. **Slander.**—The making of mere oral defamatory statements does not always subject one to civil prosecution. Merely insulting or abusive language is not actionable. The use of merely unpleasant or reproachful words, accompanied by any amount of publicity, will not support an action for slander, unless they are such as to be *per se* slanderous or in fact injurious to reputation.[4]

An oral statement is actionable *per se,* that is, actionable without pleading and proof of special damage, only if it (1) charges one with something criminal, (2) charges one with having a loathesome or infectious disease, likely to cause one to be excluded from society, or (3) charges one with anything likely to injure one in his business, profession, occupation, or office.[5] Other kinds of words causing special damage are actionable only on pleading and proof of such special damage.

If a case comes under any of these three heads, it can be determined at the threshold that the plaintiff has a cause of action, although he may not specially have pleaded damage. The law presumes that such utterances cause damage. As to the amount of his damages,—this must depend upon the facts in the case, and so they may be much or little. It can be said at the beginning of the action only that the slander set up indicates a cause of action and that it is of itself sufficient basis for a verdict for damages.

If a case does not come under any of these heads, it is necessary that the plaintiff plead and prove that he has

4—Bloss v. Tobey, (1824) 2 Pick. (Mass.) 320. Here defendant charged plaintiff with burning his own store, which was not a crime. Held, not slander.

5—See 25 Cyc. 264, et seq., and cases there cited. It will be noticed that some authorities divide "(3)" into two parts, but such division is unnecessary.

been damaged and in what manner and how much.[6] The plaintiff may, by pleading and proving particular damage that is the proximate and certain result of the defendant's wrong, recover substantial damages for utterances that are slanderous in fact, although they are not slanderous *per se.*[7]

210. **Libel.**—Written words, if published, are actionable *per se,* if they can be presumed, as a matter of law, to tend to blacken the plaintiff's reputation and to bring him into public hatred, contempt, or ridicule.[8] The fact that the words, if only spoken, would not have been actionable *per se,* is immaterial.[9] If the words used do, in fact, bring one into public hatred, contempt, or ridicule, they are libelous in fact, that is, by virtue of the fact that they actually do, in the particular case, have this effect, even if they are not libelous *per se;* but, in such a case, the person libelled makes out his cause of action only by pleading and proving, in addition to the fact of publication, the fact that he is actually damaged.[10]

210a. **Malice.**—Actual malice of the defendant in the perpetration of the wrong is not essential to the mainte-

6—Lynch v. Knight, (1861) 9 H. L. Cas. 577, 11 Eng. Repr. 854; Windsor v. Oliver, (1871) 41 Ga. 538.

7—Moore v. Meagher, (1807) 1 Taunt. 39, 127 Eng. Repr. 745.

8—"The attempts * * * to define a libel, though practically innumerable, have never been so comprehensive and accurate as to comprehend all cases that may arise. Townsh. Slander & L. (4th ed.) § 20. And such attempts, in this regard, in some degree resemble similar attempted definitions of fraud. A definition which has met with frequent approval is that given by Parsons, C. J., in Com. v. Clap, 4 Mass. 163: 'A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule.'"—McGinnis v. Knapp, (1892) 109 Mo. 131, 18 S. W. 1134.

9—Cerveny v. Chicago Daily News Co., (1891) 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864; Krug v. Pitass, (1900) 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317.

10—Strauss v. Meyer, (1868) 48 Ill. 385; Caldwell v. Raymond, (1855) 2 Abb. Prac. (N. Y.) 193.

nance of an action for slander or libel. The existence of actual malice is important principally, if not entirely, in determining whether the defendant's communication, if of the class of qualifiedly privileged communications, is privileged in the particular case, and whether exemplary damages are to be awarded. The "malice in law" so often spoken of in cases of defamation, is of no practical importance in this field. In cases wherein the words are held actionable *per se,* courts that wholly disregard "malice in law" arrive at practically the same identical net results as do those which attach importance to it; for the latter conclusively presume malice from the very fact of the utterance or publication of words that are actionable *per se,* thus actually eliminating the question of actual malice as effectually as do the courts that ignore the existence of "malice in law" and simply say that malice is not a necessary ingredient of the wrong.[11]

In a case involving a question of absolutely privileged communication (a necessary communication by an official or other person in connection with public business or the administration of justice), the matter of malice cannot be of any importance, as the law permits no inquiry into it. But where a communication is only qualifiedly privileged (where the person speaking the words is merely performing a duty), the question of the existence of malice becomes very important; for, if the plaintiff proves that the defendant has, in such a case, acted with actual malice,

11—As one writer has well said: "Malice is said to be an essential to slander or libel. This is malice in law. It is not necessary. It is simply a fiction of law. The use of the term means nothing, is misleading, and we shall disregard it in our further discussion here." Willis on Damages, p. 181.

"The existence of actual malice is one of the relevant and material circumstances in an action of slander or libel. It may tend to spread the charge of the slander or libel, or it may induce the hearers or readers to treat it more lightly than they would an utterance from a less prejudiced source. It may be that the reputation will not suffer as much if the hearers or readers know the motive of the charge to be actual malice as when they believe the charge is made in good faith and without malice, or it may

he is liable, and otherwise he is not liable, the privilege depending upon the absence of malice.[12]

211. **Elements of Compensation.**—Compensatory damages may be recovered for the following elements: injury to reputation;[13] proximate financial losses, including losses in business or profession;[14] mental suffering;[15] and any items of proximate damage that can be proved with certainty.

Where a statement is actionable *per se*, injury to reputation is presumed, and substantial damages may be recovered without special pleading and proof of damage.[16] It is sometimes held that loss of an election is not a proper element of damage in slander or libel, as damages for such a result are too remote and speculative;[17] but

be exactly the reverse. Each case must be governed by its own circumstances and setting. Further proof of actual malice may disclose the injury to be greater in consequence of the publication of the charge in actual malice, and hence the compensatory damages will be greater because assessed in proportion to the actual injury.

"The effect upon the feelings of him against whom the charge is made may be greater where he knows and must carry with him the knowledge that another entertains actual malice against him."—Craney v. Donovan, (1917) 92 Conn. 236, 102 Atl. 640.

In states where, as in Connecticut, exemplary damages are not allowed, such a discussion of actual malice as the above is of great practical importance, since the admission of the circumstance of actual malice as affecting the amount of actual damage is the only means of increasing damages because of defendant's bad motive. In this same case, however, the court disclaims any intention of mitigating or enhancing actual damages, but justifies the admission of evidence of malice as tending to show the extent of the actual damage, as already indicated.

12—Bradley v. Heath, (1831) 12 Pick. (Mass.) 163, 22 Am. Dec. 418.

13—Markham v. Russell, (1866) 12 Allen (Mass.) 573, 90 Am. Dec. 169.

14—Turner v. Hearst, (1896) 115 Calif. 394, 47 Pac. 129. If the words are actionable per se in that they injure the plaintiff in his business or profession, allegation and proof of damage are unnecessary; damage is presumed. Bee Publishing Co. v. World Publishing Co., (1900) 59 Neb. 713, 82 N. W. 28.

15—Markham v. Russell, supra.

16—Bradley v. Cramer, (1886) 66 Wis. 297, 28 N. W. 372.

17—Taylor v. Moseley, (1916) 170 Ky. 592, 186 S. W. 634, Ann. Cas. 1918 B 1125 and note.

there are decisions *contra*.[18] The former holding certainly encourages freedom of discussion of the merits and demerits of the candidates for political office, and seems really advantageous from the standpoint of the public. One writer places public office in the same category with other kinds of employment and urges that its loss is a recoverable element of damage.[19] There is little adjudication on the subject. A general falling off in his business, as a result of the defamation, may be shown by the plaintiff, and compensation may be allowed therefor. When once a cause of action is made out, it is held here, as elsewhere, that the plaintiff may recover for mental suffering; although, where there is no cause of action independently of the mental suffering, there cannot be any recovery for such suffering any more than there can be under similar circumstances in any other field of the law of torts.[20] Ostracism from the society of the plaintiff's former companions, adds to the damage of the plaintiff, so that evidence of such ostracism is admissible on the question of damages.[21]

In the case of the publication of words libelous *per se*, there is no difficulty in holding that the defamed person may recover for mental suffering;[22] and it has even been

18—See Brewer v. Weakley, (1807) 2 Overt. (Tenn.) 99, 5 Am. Dec. 656.

19—Townshend on Slander and Libel, § 247.

20—For general principles, see Chapter XXI, "Mental Suffering."

21—Burt v. McBain, (1874) 29 Mich. 260.

22—Shattuc v. McArthur, (1886) 29 Fed. 136; Taylor v. Hearst, (1895) 107 Calif. 262, 40 Pac. 392; Hassett v. Carroll, (1911) 85 Conn. 23, 81 Atl. 1013, Ann. Cas. 1913 A. 333; Washington Times Co. v. Downey, (1905) 26 App. Cas. (D. C.) 258, 6 Ann. Cas. 765; Adams v. Smith, (1871) 58 Ill. 417; Hanson v. Krehbiel, (1904) 68 Kan. 670, 75 Pac. 1041, 64 L. R. A. 790, 104 Am. St. Rep. 422; Markham v. Russell, (1866) 12 Allen (Mass.) 573, 90 Am. Dec. 169; Ellis v. Brockton Pub. Co., (1908) 198 Mass. 538, 84 N. E. 1018, 15 Ann. Cas. 83, 126 Am. St. Rep. 454; McCollum v. Smith (Mo. App. 1917) 199 S. W. 271; Nott v. Stoddard, (1865) 38 Vt. 25, 88 Am. Dec. 633.

held that the husband of the defamed person may recover for loss of his wife's society and services.[23]

Where plaintiff in a libel case offers to prove her dependence upon her own exertions for a living, in order to show that impaired capacity to labor, because of mental suffering, is an element of actual damage, such evidence is admissible.[24]

212. **Exemplary Damages.**—Exemplary damages are very frequently assessed in cases of slander or libel. Repetitions of the defamation may be considered in aggravation of damages.[25] Here, as elsewhere, malice is the general ground upon which exemplary damages are awarded. There is, however, nothing in principle or application that differentiates these cases from others wherein such damages are assessed, and the student is referred to the general treatment of exemplary damages.[26]

213. **Mitigation.**—"In an action for defamation two classes of facts are pleadable and provable in mitigation of damages: First, such as impeach the character of the plaintiff; secondly, such as tend to negative the malicious motive of the defendant."[27] If the plaintiff's character

23—Garrison v. Sun Printing, etc., Association, (1912) 207 N. Y. 1, 100 N. E. 430, Ann. Cas. 1914 C 288.

24—Washington Times Co. v. Downey, (1905) 26 App. Cas. (D. C.) 258, 6 Ann. Cas. 765. "Moreover, the reasonable apprehension of loss of employment might have contributed in some degree to the mental suffering." Thus it is seen that there are two excellent reasons for the admission of such testimony.

" 'The time, place, manner, and other circumstances of the preparation and publication of defamatory charges,' as well as the language of the charge, are admissible facts, tending to prove the extent of the injury to the reputation and feelings, and tending to prove the malice of the charge."—Craney v. Donovan, (1917) 92 Conn. 236, 102 Atl. 640, citing Hassett v. Carroll, (1911) 85 Conn. 23, 81 Atl. 1013, Ann. Cas. 1913 A 333.

25—Hatch v. Potter, (1845) 2 Gil. (Ill.) 725, 43 Am. Dec. 88.

26—Chapter XI.

27—Witcher v. Jones, (1892) 17 N. Y. Supp. 491; quoted with ap-

and reputation are bad, obviously he cannot have suffered so much loss from the defamation as he would have suffered if he had been a man of good character and reputation. His loss being less, it is reasonable that his compensation should be less.[28] "It cannot be just that a man of infamous character should, for the same libelous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result, unless character be a proper subject of evidence before a jury."[29] It may be shown in mitigation both that the plaintiff's general reputation as to moral worth is bad, and that his general reputation is bad as to the feature covered by the alleged defamation.[30] *A fortiori* the defendant has a right to mitigate damages by pleading and proving the truth of the alleged defamatory statement.[31] If the defendant made the alleged statement in an honest belief in its truth and without malice, he may plead and prove these facts in mitigation of exemplary damages,[32] though not in mitigation of purely compensatory damages.[33]

Where it is shown that defendant was, at the time of his alleged slanderous utterance, intoxicated, the fact of

proval in Dinkelspiel v. New York Evening Journal Pub. Co., (1903) 85 N. Y. Supp. 570, 42 Misc. 74. Accord: Morris v. Lachman, (1885) 68 Calif. 109, 8 Pac. 799; Sheahan v. Collins, (1858) 20 Ill. 325, 71 Am. Dec. 271; Story v. Early, (1877) 86 Ill. 461.

28—Sheahan v. Collins, supra; Sickra v. Small, (1895) 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

29—Stone v. Varney, (1843) 7 Metc. (Mass.) 86, 39 Am. Dec. 762.

30—Sickra v. Small, supra; Lamos v. Snell, (1833) 6 N. H. 413, 25 Am. Dec. 468.

31—Thomas v. Dunaway, (1863) 30 Ill. 373; Sibley v. Marsh, (1828) 7 Pick. (Mass.) 38. The truth of the statement, if satisfactorily proven, is held to be a complete justification, negativing defendant's liability. Foss v. Hildreth, (1865) 10 Allen (Mass.) 76.

32—Shattuc v. McArthur, (1885) 29 Fed. 136; Callahan v. Ingram, (1894) 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

Under some circumstances, a retraction may be considered in mitigation of damages. See Suth. Dam. 1231, and cases there cited.

33—Callahan v. Ingram, supra; Thompson v. Powning, (1880) 15 Nev. 195.

his intoxication may be considered in mitigation of damages.[34] It would seem that there are two excellent reasons for this rule: First, the drunkenness of defendant may well be said to lessen the actual damage and thus to diminish compensatory damages,—for the words of a drunken man, if his drunkenness is known, are less likely to be given credence and to injure reputation; and second, evidence of the drunkenness of the defendant at the time of the utterance would tend to negative malice, and thus to mitigate exemplary damages.

214. **Proximity and Certainty.**—The rules of proximity and certainty play an important part in limiting the elements for which compensation may be given. Probably in no field can a plaintiff conjure up any more consequences of a wrong than in defamation; and probably nowhere are any more of the alleged consequences remote or uncertain. The rule of proximity applies to both general and special damages; and the plaintiff cannot escape the rule and recover for remote damage by simply pleading it specially.[35] Where defendant falsely said that he had carnal connection with A, the wife of B, and A and B bring an action against defendant, it has been held that an action does not lie, although A has lost the society of her friends, and has, through worry over the matter, sustained a long illness, the court saying that the damage alleged is not a natural consequence of the words spoken.[36] Circumstances in a similar case might be slightly different and so might render such results proximate.

Slanderous words imputing to a wife unchastity before her marriage would not support the assessment of dam-

34—Alderson v. Kahle, (1914) 73 W. Va. 690, 80 S. E. 1109, Ann. Cas. 1916 E 561, and cases there cited.

35—Lynch v. Knight, (1861) 9 H. L. Cas. 577, 11 Eng. Repr. 854; Georgia v. Kepford, (1876) 45 Ia. 48; Anonymous, (1875) 60 N. Y. 262, 19 Am. Rep. 174.

36—Allsop v. Allsop, (1860) 5 Hurl. & N. 534, 157 Eng. Repr. 1292.

age in favor of the wife for loss of *consortium*, as this is not a proximate result of such wrong.[37] Likewise, false words charging a young woman with self-pollution, will not support the assessment of damages for loss of music lessons and a silk dress which her father refused her after hearing the charge.[38] The defendant is, however, liable for all proximate consequences of his act of defamation.[39]

215. **Discretion of the Jury.**—Damages for slander and libel are so uncertain and indefinite in amount that it is impossible for a court to exercise more than a very vague and inefficient control over the discretion of the jury in these cases. "This is not the case of the greyhound, of the value of which the court could form an estimate, and say they have found forty times too much."[40] But, while, from the nature of the case, it is not usually easy to say that a verdict is clearly excessive, there exist many cases in which the amount of the verdict is so far out of reason, in view of the nature of the defamation, the extent of publicity given it, and the other relevant facts in the case, that it is evident that the jury was actuated by passion or prejudice. In such cases, the verdict will be set aside by the court, as in other classes of litigation.[41]

37—Lynch v. Knight, (1861) 9 H. L. Cas. 577, 11 Eng. Repr. 854.

38—Anonymous, (1875) 60 N. Y. 262, 19 Am. Rep. 174. This case shows the working of the arbitrary rule requiring proof of special damage in all except a narrowly limited class of these cases. The result is regretted by Grover, J., who wrote the opinion. See also Peters v. Garth, (1899) 20 Ky. Law 1934, 50 S. W. 682.

39—Such is the exclusion of a virtuous young woman from the society in which she had formerly moved, as a result of slanderous statements charging want of chastity. Burt v. McBain, (1874) 29 Mich. 260.

40—Gilbert v. Berkinshaw, (1774) Loft. 771.

"The actual pecuniary damages in actions for defamation, as well as in other actions for torts, can rarely be computed, and are never the sole rule of assessment."—Tillotson v. Cheetham, (1808) 3 Johns. (N. Y.) 56, 3 Am. Dec. 459, quoted in Grable v. Margrave, (1842) 3 Scam. (Ill.) 372, 38 Am. Dec. 88.

41—Peterson v. Western Union Tel. Co., (1896) 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

CASE ILLUSTRATIONS

1. Defendant spoke the following words in regard to plaintiffs: "They have sold out; they are not worth fifty cents on the dollar." Held, not actionable *per se.* Plaintiffs were not engaged in trade at the time the words were spoken. As to any damage,—plaintiffs can recover for it only if they plead and prove it.[42]

2. A orally said that B was guilty of sodomy, in a state wherein sodomy was not a crime. Held, not actionable *per se.*[43]

3. Defendant's newspaper called plaintiff an "anarchist." Held, that this sustains an action for libel.[44]

4. Buckstaff, the plaintiff, was called by defendant's newspaper, "Senator Bucksniff," "His majesty Bucksniff," "A legislative god," "Dearly-beloved Bucksniff," "Divine Senator," "Mighty being," and "Third Ward Omnipotence." Held, that these words are libelous *per se,* as tending to bring the plaintiff into ridicule or contempt.[45]

5. Defendant published a statement that plaintiff had owed a bill for medical services for several years, that he had been sued, and, having no other defense "cowardly slinks behind that of statutory limitation," and that "such a course is not exactly in accordance with our idea of strict integrity." Held, not libelous. "Since the law recognizes this defense as legitimate and honorable, to accuse one of making it would not amount to defamation."[46]

6. Defendants published an article stating that plaintiff, a physician, was a blockhead or fool, and appealing to all the Poles in Buffalo not to trust themselves or their families to his professional care when he hated them so that he would not help them if he could. The article was actionable *per se.*[47]

42—Windsor v. Oliver, (1871) 41 Ga. 538.

43—Melvin v. Weiant, (1880) 36 O. St. 184, 38 Am. Rep. 572; Davis v. Brown, (1875) 27 O. St. 326.

44—Cerveny v. Chicago Daily News Co., (1891) 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864.

45—Buckstaff v. Viall, (1893) 84 Wis. 129, 54 N. W. 111.

46—Hollenbeck v. Hall, (1897) 103 Ia. 214, 72 N. W. 518, 39 L. R. A. 734, 64 Am. St. Rep. 175; citing Bennett v. Williamson, (1850) 4 Sandf. (N. Y.) 60.

47—Krug v. Pitass, (1900) 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317.

7. Defendant spoke false words imputing incontinence to plaintiff, who had been accustomed to receive many invitations to eat meals gratuitously. As a result of the false utterance, plaintiff no longer received such invitations and thereby became greatly impoverished. Held, that such damage supported an action for slander.[48]

8. Defendant's agent, mistaking plaintiff's identity, ordered her out of its public grounds, seizing her by the arm in a rough manner. "While the act partakes of the nature of defamation of character it has in it, in addition, some of the elements of an assault, although strictly speaking it is not either. It must not be understood, however, that we hold mere words of common abuse actionable *per se*. They are not so unless a special injury be shown. But if an actionable wrong is otherwise committed, it can be shown that it was accompanied with words of common abuse to enhance the damages." Among the elements to be allowed for is mental suffering.[49]

9. Defendant's newspapers published statements that the plaintiff, a young married woman, moving in high social circles, and possessed of a good reputation, had eloped with one R. No actual malice was shown, but the evidence indicated recklessness and negligence in publishing the libel without making any investigation to ascertain the truth or falsity of the report. Held, that this is a proper case for vindictive damages.[50]

10. Defamatory matter was published by defendant, to the

48—Moore v. Meagher, (1807) 1 Taunt. 39, 127 Eng. Repr. 745. So also where the plaintiff has been merely cut off from the hospitality of friends. Williams v. Hill, (1838) 19 Wend. (N. Y.) 305.

49—Davis v. Tacoma Railway, etc., Co., (1904) 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802.

50—Smith v. Matthews, (1897) 152 N. Y. 152, 46 N. E. 164. See Taylor v. Hearst, (1897) 118 Calif. 366, 50 Pac. 541, from which the following is quoted: "It will be observed that the question of express malice, which may be evidenced either by a willful intent to injure, or by gross carelessness, was, under the facts and the law as laid down in the former opinion, entirely removed from the case. This was the view taken by the trial court, and the jury was so instructed. Plaintiff's recovery, therefore, was limited to compensatory damages. Certain questions asked of defendant's witnesses were ruled out under objections. These questions were addressed to the good faith of the publication, and to the negligence of the publisher. But good faith and reasonable care are pertinent inquiries where the question of punitive damages is involved, not where, the matter being libelous per se, and

effect that plaintiff and Mrs. Blake had eloped, and were living together in adultery. Defendant has a right, in order to mitigate damages, to show that plaintiff's general reputation as to morals, is bad; and that his general reputation as to the traits covered in the libel, is bad. But evidence that plaintiff's conduct was such as to excite the suspicion of defendant, is not admissible in mitigation. The injury caused by the words, and not the moral culpability of the speaker, measures the damages.[51]

11. Defendant circulated a printed statement that a judgment for $129 had been recorded against plaintiff, a retail merchant. As a result, wholesale dealers refused to fill plaintiff's orders. Held, that plaintiff cannot recover for profits lost. Such damages are too remote and speculative.[52]

12. Defendant published a statement that plaintiff, a female rifle expert, was a victim of drugs, that she was arrested, charged with robbery, and fined after pleading guilty, and that she was destitute and forced to accept shelter from an old colored man. Plaintiff seeks damages for mental suffering, injury to health, and consequent inability to shoot during the season of 1903, by reason of which she has failed to earn $150 per week. Held, that she may recover for mental suffering, but not for nervous prostration, injury to health, and loss of wages.[53]

13. Defendant orally charged plaintiff with unchastity. Held that ill health, although actually produced by the slander, is not legally a natural or ordinary consequence of the slander, and so cannot be recovered for.[54]

14. Defendant said plaintiff was guilty of larceny and adultery. Plaintiff's wife sued him for a divorce on the ground of inhuman treatment. This is not a proximate consequence of the slander.[55]

its publication admitted, the recovery is expressly limited to compensatory damages; for a plaintiff under such facts is entitled to compensatory damages, without regard to the good faith or caution which attended the publication."

51—Sickra v. Small, (1895) 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

52—Bradstreet Co. v. Oswald, (1895) 96 Ga. 396, 23 S. E. 423.

53—Butler v. Hoboken Printing and Publishing Co., (1905) 73 N. J. Law 45, 62 Atl. 272. It is to be noticed that plaintiff's loss of wages did not result from failure to procure engagements by reason of loss of professional standing.

54—Terwilliger v. Wands, (1858) 17 N. Y. 54, 72 Am. Dec. 420.

55—Georgia v. Kepford, (1876) 45 Ia. 48.

CHAPTER XLVI

Malicious Prosecution

216. **In General.**—Malicious prosecution is a wrongful prosecution of one person by, or at the instigation of, another, in either a civil or a criminal proceeding, without probable cause. In order to maintain his action for malicious prosecution, the plaintiff must show that the wrongful prosecution terminated in his favor. It is held that malice, want of probable cause, and damage must concur in order to afford a cause of action;[1] but the very fact of the maintenance of a prosecution without probable cause is, according to the better view, sufficient to present a case of legal malice, or, in other words, from such circumstances the law infers malice.[2] According to the weight of authority and on sound principle, it is not essential to the maintenance of the suit that the person of the plaintiff should have been molested or his property seized, whether the wrongful prosecution was criminal or civil.[3] It has been held, and very correctly, it would seem,

1—Herbener v. Crossan, (1902) 4 Pen. (Del.) 38, 55 Atl. 223.

2—Ross v. Kerr, (1917) 30 Idaho 492, 167 Pac. 654; Hurlbut v. Hardenbrook, (1892) 85 Ia. 606, 52 N. W. 510; Walser v. Thies, (1874) 56 Mo. 89. But a suit brought maliciously, with probable cause, does not sustain an action for malicious prosecution. Lipowicz v. Jervis, (1904) 209 Pa. 315, 58 Atl. 619. Contra: dictum in Walser v. Thies, supra.

3—Peerson v. Ashcraft Cotton Mills, (Ala. 1918) 78 So. 204; Whipple v. Fuller, (1836) 11 Conn. 582, 29 Am. Dec. 330; McCardle v. McGinley, (1882) 86 Ind. 538; Brand v. Hinchman, (1888) 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362; Antcliff v. June, (1890) 81 Mich. 477, 45 N. W. 1019, 10 L. R. A. 621, 21 Am. St. Rep. 533; Eickhoff v. Fidelity, etc., Co., (1898) 74 Minn. 139, 76 N. W. 1030; McCormick Harvesting Machine Co. v. Willan, (1901) 63 Neb. 391, 88 N. W. 497, 93 Am. St. Rep. 449; Kolka v.

on principle, that where a writ of attachment is sued out wrongfully and without probable cause and is actually levied, the law will presume some injury and award at least nominal damages.[4] But some courts hold that, where there has been no arrest of the person or seizure of the property of the plaintiff, who was the defendant in the former action, he has been compensated sufficiently by being awarded costs in the former action.[5] The modern tendency is toward the former view; and this view seems the more logical, for otherwise all non-physical elements of damage, such as loss of reputation and mental suffering, must, if standing alone, go without compensation. The usual rules of certainty, mitigation, aggravation, and exemplary damages prevail here as elsewhere.

217. **The Elements of Damage** most commonly entering into a case of malicious prosecution are: injury to reputation, loss of time, injury to pecuniary or other property rights, counsel fees incurred in contesting the malicious prosecution, and loss of liberty of the person.[6] The plain-

Jones, (1897) 6 N. Dak. 461, 71 N. W. 558, 66 Am. St. Rep. 615; Closson v. Staples, (1869) 42 Vt. 209, 1 Am. Rep. 316. "It is argued by the authorities taking this view that the costs which the law gives a successful party are no adequate compensation for the time, trouble and expense of defending a malicious and groundless civil action. The party sued must devote some time to the defense of the suit; he must look up his evidence and employ counsel. This waste of time and necessary expenditure of money, by its results, affects the property of the defendant. For these expenses the costs recovered in the action are no compensation at all. That the action would lead to endless litigation is answered by saying that where allowed it has not done so."—18 R. C. L. 14.

See also 16 Mich. Law Rev. 653.

4—Dorr Cattle Co. v. Des Moines National Bank, (1904) 127 Ia. 153, 98 N. W. 918, 4 Ann. Cas. 519.

5—Smith v. Michigan Buggy Co., (1898) 175 Ill. 619, 51 N. E. 569, 67 Am. St. Rep. 242; Wetmore v. Mellinger, (1884) 64 Ia. 741, 18 N. W. 870, 52 Am. Rep. 465; Potts v. Imlay, (1816) 4 N. J. Law 330, 7 Am. Dec. 603; Mayer v. Walter, (1870) 64 Pa. 283.

6—"If * * * the malicious prosecution complained of is founded upon a criminal charge, on which the defendant therein was arrested, he has a right to indemnity for all the injury to reputation, feelings, health, mind and person caused by

tiff has a clear right to recover his expenses in defending against the malicious prosecution, and this right is in no way lessened by the fact that some one else has paid these expenses for him,[7] or by the fact that he has not yet paid such expenses.[8]

Illegal treatment of the plaintiff by the jailer is not a proximate result of the malicious prosecution and arrest, and so it cannot properly be considered an element of damage.[9] But it has been held that plaintiff may testify to the filthy condition of the jail and his sufferings while confined therein.[10]

Injury to financial credit is a proper element of damage, if specially pleaded.[11] In some instances at least, mental suffering is a proper element.[12]

Where the plaintiff was arrested about 5 o'clock in the afternoon, taken through the public streets of a city, to

the arrest, including the expenses of his defense.''—Lytton v. Baird, (1883) 95 Ind. 349.

See Seidler v. Burns, (1912) 86 Conn. 249, 85 Atl. 369, Ann. Cas. 1916 C 266.

''We cannot, at this day, shut our eyes to the fact known by everybody, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit.''—Whipple v. Fuller, (1836) 11 Conn. 582, 29 Am. Dec. 330, approved in Linsley v. Bushnell, (1842) 15 Conn. 225, 38 Am. Dec. 79, which says: ''If taxable costs are presumed to be equivalent to actual, necessary charges, as a matter of law, every client knows, as a matter of fact, they are not. And legal fictions should never be permitted to work injustice. This court has repudiated this notion.''

7—Krug v. Ward, (1875) 77 Ill. 603.

8—Minneapolis T. M. Co. v. Regier, (1897) 51 Neb. 402, 70 N. W. 934.

9—Baer v. Chambers, (1912) 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913 D 559.

10—Grimes v. Greenblatt, (1910) 47 Colo. 495, 107 Pac. 1111, 19 Ann. Cas. 608.

11—Donnell v. Jones, (1848) 13 Ala. 490; Brand v. Hinchman, (1888) 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362; McIntosh v. Wales, (1913) 21 Wyo. 397, 134 Pac. 274, Ann. Cas. 1916 C 273.

But it has been held that ''injuries to credit or character or business are too remote and speculative to be considered.''—Campbell v. Chamberlain, (1860) 10 Ia. 337; Lowenstein v. Monroe, (1880) 55 Ia. 82, 7 N. W. 406.

12—Parkhurst v. Masteller, (1881) 57 Ia. 474, 10 N. W. 864.

the police station, and there confined until the next morning, the circumstances of aggravation, the bodily pain, and the injury to his reputation were all proper elements of damage.[13] On the question what elements of damage may be recovered for without special pleading and proof, much depends upon the stage at which the prosecution has terminated. If the defendant has merely attempted, without success, to have the plaintiff indicted for a misdemeanor, there has been, in fact, no prosecution at all; and so, in such a case, there is no action without special pleading and proof of damage. If plaintiff has actually been indicted, tried and acquitted, it is obvious that the cause of action is complete; and, where the elements of arrest and detention or imprisonment of the person to await trial have also entered into the case, such elements may be recovered for.[14]

Where defendant, without probable cause, prosecuted plaintiff on a charge of embezzlement, it was held that, on the question of damages, it was competent for plaintiff to show: the expenses to which he was put, in the maliciously prosecuted action, in employing counsel and procuring sureties on his bond; the nature of his business, the tools required therein, and the difficulty in getting tools after the wrongful prosecution; the difficulty which he had in getting employment after such prosecution; the injury to his feelings and to his reputation; and the indignity.[15]

218. **Discretion of the Jury.**—The nature of the action is such that any exact calculation of damages is impossible, and courts are, in most of these cases, unwilling to

13—Seidler v. Burns, (1912) 86 Conn. 249, 85 Atl. 369, Ann. Cas. 1916 C 266.

14—Baer v. Chambers, (1912) 67 Wash. 357, 121 Pac. 843, Ann. Cas. 1913 D 559.

15—Wheeler v. Hanson, (1894) 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408.

say that the verdict is excessive. The jury is considered peculiarly the proper judge of the amount of damages.[16]

Where defendant had wrongfully sued plaintiff for $4,000 on the second of a set of bills of exchange and attached his property, holding it for about four months, a verdict for $15,000 was held not excessive.[17]

In determining whether a verdict is excessive, it often becomes necessary, as in slander or libel, to consider the reputation of the plaintiff. If his reputation had already been bad, that fact may have contributed to the existence of probable cause; and then too, an already bad reputation cannot suffer so great an injury as can a good one. So, where the plaintiff, a man of bad moral character and of bad reputation for truth and veracity, was arrested, but not incarcerated, and the actual amount expended by plaintiff on account of the prosecution, and the value of his time lost, did not exceed $100 to $150, a verdict for $3,000 is excessive.[18]

Where plaintiff has been guilty of wrongful and illegal conduct in connection with the matter in regard to which he alleges he has been maliciously prosecuted, and is guilty of a wrong in the premises very similar to the one mistakenly alleged in the prosecution, a court will not uphold a very large verdict in his favor.[19]

16—Black v. Canadian Pacific Ry., (1914) 218 Fed. 239.

17—Weaver v. Page, (1856) 6 Calif. 681.

18—Davis v. Seeley, (1894) 91 Ia. 583, 60 N. W. 183, 51 Am. St. Rep. 356.

19—Davis v. McMillan, (1905) 142 Mich. 391, 105 N. W. 862, 3 L. R. A. (N. S.) 928, 7 Ann. Cas. 854, 113 Am. St. Rep. 585. Here defendant had caused plaintiff's arrest on a charge of obtaining property under false pretenses, stating that plaintiff had falsely represented that K had authorized plaintiff's brother to take certain property away. The charge could not be sustained, as the proof showed only that plaintiff's statement had been that plaintiff's brother had told plaintiff that K had given such permission. The court says, in setting aside a verdict for $4,000 damages: "Though technically the particular pretense may have been without probable cause, it is inferable that there was

Where plaintiff was arrested and prosecuted on a mistaken charge of shortage in his accounts as bookkeeper, was tricked into going into Canada, where the charges were made, then was thrust into jail, transported a long distance in chains, refused the necessary services of a physician, again placed in jail and kept there for about a month, then released with no attempt on the part of the prosecution to show his guilt, and with the admission that a mistake had been made and that there was no case, and was finally refused transportation back to his home, 2,400 miles away, which had been promised him by defendant, a verdict for $25,000 is not excessive.[20]

219. **Exemplary Damages** are very often assessed.[21] Evidence that defendant, after wrongfully causing the prosecution of an employee, threatened to prevent him from holding a position elsewhere, and that he inserted in the newspapers a statement to the effect that he had abandoned the prosecution out of sympathy with the family of plaintiff, is "amply sufficient to establish the existence of actual malice" and to justify the assessment of punitive damages.[22] Circumstances are often such as to warrant the assessment of heavy damages. Where defendant prosecuted plaintiff on a false criminal charge of having committed adultery with his wife, a poor sickly woman, whom defendant compelled to testify in support of his charge, threatening her with a butcher knife, the

a substantial reason for believing that plaintiff had unjustly and deceitfully obtained the property with intent to cheat and defraud. Under these circumstances the liberality of the jury is remarkable, especially as most of the damages must have been for mortification and wounded feelings." Stress is also laid upon the fact that plaintiff had apparently obtained and kept property worth upwards of $2,000, not belonging to him.

20—Black v. Canadian Pacific Ry., (1914) 218 Fed. 239.

21—Lytton v. Baird, (1883) 95 Ind. 349; Parkhurst v. Masteller, (1881) 57 Ia. 474, 10 N. W. 864.

22—Ross v. Kerr, (1917) 30 Idaho 492, 167 Pac. 654.

court allowed a verdict for $1,850 to stand, saying that it might well have been for $5,000.[23]

220. **Wrongful Use of Process.**—Very similar to a suit for malicious prosecution is the action for wrongfully suing out the process of a court. A common example of this is the action for wrongful attachment of the plaintiff's property. The elements of damage in an action for wrongful use of process vary according to the nature of the case; but, in general, the possible elements are the same as in malicious prosecution. These elements are recoverable on special pleading and proof.[24]

CASE ILLUSTRATIONS

1. Plaintiff and her husband were wrongfully prosecuted for larceny by defendants. There was evidence of actual malice on the part of one of the defendants. The hearing was held in a country precinct, eighty miles from the county seat, where the attorneys resided, and plaintiff had to pay her attorney a fee of $250. Plaintiff's financial credit was injured. Held, that punitive damages were proper, and that $500 was not excessive.[25]

2. Plaintiff proved that, in defending against a malicious prosecution, he spent $150 for counsel fees and to procure the attendance of his witnesses. A verdict for $5 is set aside as inadequate.[26]

23—Huber v. Zeiszler, (N. Dak. 1917) 164 N. W. 131.

24—Lawrence v. Hagerman, (1870) 56 Ill. 68, 8 Am. Rep. 674.

25—McIntosh v. Wales, (1913) 21 Wyo. 397, 134 Pac. 274, Ann. Cas. 1916 C 273.

26—Waufle v. McLellan, (1881) 51 Wis. 484, 8 N. W. 300. Formerly, in England, the court would not set aside as inadequate a verdict in malicious prosecution, false imprisonment, slander, or libel. See 18 R. C. L. 76-77, 47 L. R. A. 43.

CHAPTER XLVII

False Imprisonment

221. **The Wrong.**—Anyone who has been unlawfully deprived of his liberty to go about as he pleases, may maintain against the wrongdoer an action for false imprisonment. The imprisonment may be with or without the use of legal machinery. It may be with or without malice.[1]

222. **Amount and Elements of Compensation.**—Large damages are often assessed in this action. In arriving at the amount of damages, it is necessary to consider the character and duration of the restraint imposed and the circumstances. Damages for all injuries proximately and certainly arising from the imprisonment may be assessed. The elements of damage vary much in different cases and may include new elements in a new case, so that it would be hazardous to attempt to give a positively exhaustive list of heads of damage. Among the most common elements of damage in false imprisonment are: loss of time, interruption of business or occupation, inconvenience, discomfort, physical suffering, mental suffering, humiliation, and indignity.[2]

Where plaintiff was first wrongfully arrested and was held until rightfully placed under arrest, damages are

1—Colter v. Lower, (1871) 35 Ind. 285, 9 Am. Rep. 735.

2—Beckwith v. Bean, (1878) 98 U. S. 266, 25 L. ed. 124.
See: Ross v. Leggett, (1886) 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; Cone v. Central R. Co., (1898) 62 N. J. Law 99, 40 Atl. 780; Craven v. Bloomingdale, (1902) 171 N. Y. 439, 64 N. E. 169.

limited to the detention under the wrongful arrest;[3] but of course a new wrongful arrest or an invalid change in an irregular warrant, will not serve to end the false imprisonment and so will not restrict the damages to the preceding period, as would a new and lawful arrest.[4]

As in other fields, if the act complained of be trivial in its nature and in its injurious results, a verdict for nominal damages is proper. So, where defendant had plaintiff arrested and detained only long enough to walk across the street, and the jury found a verdict for six cents and costs, it was held that it was not proper for the court to interfere with the verdict.[5]

Circumstances of aggravation and of mitigation should be considered, and, in a proper case, exemplary damages may be allowed.[6]

Where defendants, army officers, wrongfully, but in good faith, imprisoned plaintiff under a military order, without a warrant, for aiding and abetting soldiers to desert, it was held that the fact that defendants acted in good faith, in an effort to do their duty in protection of the army, is admissible in mitigation of damages.[7]

The damages are largely in the discretion of the jury.[8]

223. **Proximity and Certainty.**—Numerous and varied consequential losses frequently result from false impris-

3—McCullough v. Greenfield, (1903) 133 Mich. 463, 95 N. W. 532, 62 L. R. A. 906.

4—Harris v. McReynolds, (1898) 10 Colo. App. 532, 51 Pac. 1016.

5—Henderson v. McReynolds, (1891) 14 N. Y. Supp. 351.

6—Hawk v. Ridgway, (1864) 33 Ill. 473; Ross v. Leggett, (1886) 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608.

7—Beckwith v. Bean, (1878) 98 U. S. 266, 25 L. ed. 124.

8—Beardmore v. Carrington. (1764) 2 Wils. 244, 95 Eng. Repr. 790. "An examination of all the cases upon both sides of this question clearly demonstrates that there is no uniform rule by which the amount of damages can be measured. There is the widest diversity of opinion among the courts as to the judgments which shall be allowed to stand. The range is wider probably in such cases than in any other."—Union Depot & R. Co. v. Smith, (1891) 16 Colo. 361, 27 Pac. 329.

onment; but the plaintiff can be compensated for only those losses which occur as the proximate results of the wrong and whose causal connection with the tort can be proved with reasonable certainty.

Where plaintiff, before recovering from the amputation of an arm, was wrongfully imprisoned, and, subsequently had to undergo a second amputation because of infection, of which the cause, so far as the evidence indicates, is uncertain, it has been held erroneous not to withdraw this element from the consideration of the jury.[9]

It has been held that the publication in a newspaper of the fact of the arrest and detention of the plaintiff is "such a natural, usual, and ordinary consequence of defendant's act that it must be deemed to have been contemplated."[10]

CASE ILLUSTRATIONS

1. Defendant, a policeman, wrongfully arrested plaintiff, a seventeen-year-old girl of good reputation, took her to the police headquarters and interviewed her, exhibiting firearms in a threatening manner. His only reason for arresting her was that she had the Christian name "Marie," that of the girl that he was trying to apprehend. Held, that a verdict for $750 damages is not excessive.[11]

2. Plaintiff, in an action for false imprisonment, offers to prove that he has a wife and family. This is irrelevant.[12]

3. Defendant, penitentiary warden, under a misapprehension of the law, wrongfully held and worked plaintiff for about two hours and a half after presentation of plaintiff's pardon. Held, that a verdict for plaintiff for $1,000 should be reduced to $25.[13]

9—Spain v. Oregon-Washington R. & N. Co., (1915) 78 Ore. 355, 153 Pac. 470, Ann. Cas. 1917 E 1104.

10—Filer v. Smith, (1893) 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

11—Ross v. Kohler, (1915) 163 Ky. 583, 174 S. W. 36, L. R. A. 1915 D 621.

12—Bergerson v. Peyton, (1900) 106 Wis. 377, 82 N. W. 291, 80 Am. St. Rep. 33.

13—Weigel v. McCloskey, (1914) 113 Ark. 1, 166 S. W. 944, Ann. Cas. 1916 C 503.

CHAPTER XLVIII

Fraud and Deceit

224. **Damage the Gist of the Action.**—Damage is the gist of actions for fraud and deceit. It is clear that the mere telling of a lie or practice of deception does not give rise to any action whatever, if no damage to the plaintiff has resulted. Mere falsifying by one person does not invade any right of another. Therefore, nominal damages, properly so-called, can never be recovered in an action for deceit or fraud.[1]

225. **Measure of Damages.**—The great disagreement in this field is in regard to the method of arriving at the measure of substantial damages. Is the plaintiff entitled to the value of the bargain which he has been inveigled into believing he is getting by making the contract he has been fraudulently induced to make, or is he entitled simply to be restored to the position in which he would have been if he had never been deceived? The weight of authority gives the plaintiff the value of his bargain, thus causing the action to savor of contract rather than of tort, so far as the measure of damages is concerned. Most courts allow the plaintiff the difference between the

1—Bartlett v. Blaine, (1876) 83 Ill. 25, 25 Am. Rep. 346; Bailey v. London Guarantee, etc., Co., (Ind. App. 1918) 121 N. E. 128; Morgan v. Bliss, (1806) 2 Mass. 111; Jex v. Straus, (1890) 122 N. Y. 293, 25 N. E. 478; Farrar v. Alston, (1826) 12 N. Car. (1 Dev.) 69. "It is elemental that, in an action for deceit and false representations, the necessary allegations are: First. The fraudulent representation relied upon to sustain the cause of action. Second. The falsity of the representation. Third. The scienter. Fourth. The intent to deceive. Fifth. Proper damages."—Brown v. Morrill, (1907) 105 N. Y. Supp. 191, 55 Misc. 224.

fraudulently represented value of the thing he has been deceived into contracting for and its real value.[2] This rule, although doubtless producing substantial justice between the parties, is anomalous, being contrary to the usual principles of damages in torts. Usually, in torts, the defendant is compelled to respond in such damages as will place the plaintiff where he would have been if the wrong had never been committed. Courts giving the plaintiff only the difference between the amount he has paid or the value of property to which he has transferred title and the value of the thing obtained in return, urge very plausibly that the plaintiff cannot have a contract measure of damages in a tort action, and that he must, in order to have contract rules apply, sue on his contract.[3]

Where the defendant has, by his fraud, caused the

2—Drew v. Beall, (1871) 62 Ill. 164; Valdenaire v. Henry, (Ind. App. 1919) 121 N. E. 550; Stiles v. White, (1846) 11 Metc. (Mass.) 356, 45 Am. Dec. 214. In Drew v. Beall, supra, the court frankly treats an action on the case for fraud and deceit in inducing a contract as if it were a contract action, so far as damages are concerned, saying: "It was not for the jury to make a new contract for them."

"It is now well settled that, in actions for deceit or breach of warranty, the measure of damages is the difference between the actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be. * * * This is the only rule which will give the purchaser adequate damages for not having the thing which the defendant undertook to sell him. To allow to the plaintiff (as the learned counsel for defendant argued in this case) only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the benefit of the wrongdoer, and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract."—Morse v. Hutchins, (1869) 102 Mass. 439.

3—Smith v. Bolles, (1889) 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. 39. See also Peek v. Derry, [1887] L. R. Ch. Div. 541. "What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase. The suit was not brought for breach of contract."—Fuller, C. J., in Smith v. Bolles, supra.

plaintiff to enter into a disadvantageous contract with a third party, the mere fact that the contract is valid does not prevent the defendant from being liable. In fact, even though the contract with the third party is marriage, so that the parties take each other "for better or for worse," the person who has fraudulently induced the marriage is liable. In such a case, the defendant is bound to make good his representations.[4]

Where a landlord misrepresents the amount of the leased land to his tenant, among the recoverable elements of damage are the reasonable expenditures by the tenant in preparation to cultivate the land.[5]

Where the defendant has induced the plaintiff to marry a third party, by a fraudulent representation that such third party has a certain amount of property, the jury should be instructed to find what amount will make good her loss, present and prospective, reasonably certain to occur, considering her expectancy of life and that of her husband.[6]

4—Beach v. Beach, (1913) 160 Ia. 346, 141 N. W. 921, 46 L. R. A. (N. S.) 98, Ann. Cas. 1915 D 216; Piper v. Hoard, (1887) 107 N. Y. 73, 13 N. E. 626, 1 Am. St. Rep. 789. See Blossom v. Barrett, (1868) 37 N. Y. 434, 97 Am. Dec. 747, where defendant had fraudulently induced plaintiff to contract a void marriage. See also Morrill v. Palmer, (1895) 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411, where defendant, a married man, had fraudulently induced plaintiff to marry him and live with him for 30 years, until she learned of the fraud. A similar case is Pollock v. Sullivan, (1880) 53 Vt. 507, 38 Am. Rep. 702. See also Sears v. Wegner, (1907) 150 Mich. 388, 114 N. W. 224, 14 L. R. A. (N. S.) 819.

5—McNeer v. Norfleet, (1917) 113 Miss. 611, 74 So. 577, Ann. Cas. 1918 E 436.

6—Beach v. Beach, (1913) 160 Ia. 346, 141 N. W. 921, 46 L. R. A. (N. S.) 98, Ann. Cas. 1915 D 216; Blossom v. Barrett, (1868) 37 N. Y. 434, 97 Am. Dec. 747; Piper v. Hoard, (1887) 107 N. Y. 73, 13 N. E. 626, 1 Am. St. Rep. 789, damages assessed for fraudulent inducement to enter void marriage; Pollock v. Sullivan, (1880) 53 Vt. 507, 38 Am. Rep. 702, action maintained where defendant, a married man, fraudulently induced plaintiff to enter a contract to marry him; Morrill v. Palmer, (1895) 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

Contra: Brennen v. Brennen, (1890) 19 Ont. Rep. 327.

The element of uncertainty as to amount of damage, in this case, does not prevent the assessment of any damages.[7]

Fraudulently inducing a person to make a loan to an irresponsible person, is a ground of action against the deceiver. The measure of damages is the excess of the amount of the loan over the value of the security taken.[8]

226. **Proximity of Cause.**—A defrauder is not responsible for all ill happenings after his fraud, but only for such as are proximate to his wrong.[9]

227. **Certainty.**—The usual rule as to certainty applies,[10] with its usual corollary that only reasonable certainty is required, which is often very important, as it is often very difficult to prove with the utmost certainty the nature and exact extent of a loss through fraud. It is the duty of the trial court to instruct the jury to consider the present loss of the plaintiff by reason of the fact that circumstances are not as stated by the defendant and also what the plaintiff is reasonably certain to lose in the future as a result of the fact that the representations are not true.[11]

228. **Exemplary Damages** have been held recoverable in cases where the deceiver acted in an extraordinarily

7—"The damages in such cases are to be found by a jury, and of necessity are somewhat speculative in character. * * * The trial court should, in its instructions upon this subject, indicate what might be considered as a present loss to the plaintiff by reason of the fact that her husband did not own the land, and such as the evidence shows she was reasonably certain to lose in the future, depending somewhat upon her expectancy of life and the expectancy of life of the husband, and leave it to the jury to find what amount will make good her loss, present and prospective."—Beach v. Beach, (1913) 160 Ia. 346, 141 N. W. 921, 46 L. R. A. (N. S.) 98, Ann. Cas. 1915 D 216.

8—Briggs v. Brushaber, (1880) 43 Mich. 330, 5 N. W. 383, 38 Am. Rep. 187.

9—Smith v. Bolles, (1889) 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. 39.

10—Findlater v. Dorland, (1908) 152 Mich. 301, 116 N. W. 410.

11—Beach v. Beach, (1913) 160

flagrant manner, violating a relation of trust and confidence or perpetrating a fraud so gross as to indicate malice.[12]

CASE ILLUSTRATIONS

1. Defendant knowingly sold a vicious mare to plaintiff, falsely representing that she was perfectly gentle and kind. In an action for deceit, plaintiff is entitled to the difference between the mare as recommended and her actual value, plus special damages for such injuries as plaintiff suffered as natural and probable consequences of the deceit, including personal injuries to plaintiff and the breaking of his buggy, caused by the running and kicking of the mare.[13]

2. Plaintiff purchased of defendant a ship twenty-eight years old, which defendant fraudulently represented to be only eighteen years old. Before he knew that the representation was false, plaintiff sent the ship to sea. She was condemned in a foreign port. Held, that "the jury were limited to the actual damages to the purchaser, caused by the false representation, not exceeding the value of the vessel, and occasioned by sending her to sea before he knew of the falsity of the representation."[14]

3. Defendant induced plaintiff to marry X, representing that X was a virtuous girl, when in fact she was then pregnant by the defendant himself. Held, that an action can be maintained on the ground of loss of *consortium*, and that exemplary damages may be assessed.[15]

Ia. 346, 141 N. W. 921, 46 L. R. A. (N. S.) 98, Ann. Cas. 1915 D 216.

12—Kujek v. Goldman, (1896) 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670; Peckham Iron Co. v. Harper, (1884) 41 O. St. 100.

13—Sharon v. Mosher, (1854) 17 Barb. (N. Y.) 518.

14—Tuckwell v. Lambert, (1849) 5 Cush. (Mass.) 23.

15—Kujek v. Goldman, (1896) 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670.

CHAPTER XLIX

Seduction

229. **In General.**—In earlier times, when the popular view of the domestic relations was much less refined than today, when fornication was considered a trivial offense or no offense at all, when the position of woman in the social order was exceedingly low, the right to the menial services of a daughter loomed so large as actually to take a more important place than a right which is today considered a thousand times more important,—the right to have one's daughter remain pure and inviolate; so that the courts, unquestionably influenced, as always, by the type of civilization in which they found themselves, early determined that a father could not maintain an action for the seduction of his daughter, unless he could prove loss of services.[1] Such a doctrine seems absurd today, when many actions are permitted to be maintained for other wrongs without any proof of pecuniary loss, as in some of the actions for failure to transmit telegrams, some of the actions for false imprisonment, some of those for assault, and many others; but the doctrine early became settled, and, while not carried to its extreme and logical conclusion today, has had its effect upon the development of the law on the subject. In order to mitigate the effect of adhering to the rule that the father must prove loss of services as a prerequisite to his right of action, some courts have held that it is sufficient if he prove his mere right to claim the services,[2] while others have simply

1—Irwin v. Dearman, (1809) 11 East 23, 103 Eng. Repr. 912; Ogborn v. Francis, (1882) 44 N. J. Law 441, 43 Am. Rep. 394.

2—Hewitt v. Prime, (1839) 21 Wend. (N. Y.) 79.

seized upon trivial and slight services as an excuse for doing justice to the father by allowing him to maintain the action.[3] Still other cases treat the requirement of proof of loss of services as merely a fiction and go practically upon the ground that no loss of services at all is necessary to the maintenance of the action.[4] The tendency of most courts is to admit the technical grounding of the action in loss of service, but to regard the proof of loss of service as being a mere beginning and to allow the assessment of damages for other and often more important elements, such as disgrace and mental suffering, and to allow also the assessment of exemplary damages. The damages, where no special damages are laid, are mainly for wounded feelings of the plaintiff.[5] The amount of damages assessed may be many times the value of the services lost.[6] The fact that the plaintiff and his seduced daughter have had no contract between them as to services, does not prevent the plaintiff from maintaining his action,[7] nor does the fact that his daughter is of

3—Bennett v. Alcott, (1787) 2 T. R. 166, 100 Eng. Repr. 90.

4—Martin v. Payne, (1812) 9 Johns. (N. Y.) 387, 6 Am. Dec. 288. In Clark v. Fitch, (1829) 2 Wend. (N. Y.) 459, the plaintiff was allowed to recover, although he showed no actual loss, except for expenses of the lying-in, which are never, of themselves, considered as a foundation for such a suit. See also Stoudt v. Shepherd, (1889) 73 Mich. 588, 41 N. W. 696.

5—Noice v. Brown, (1877) 39 N. J. Law 569.

6—"All the authorities shew that the relation of master and servant, between the parent and child, is but a figment of the law, to open to him the door for the redress of his injuries. It is the substratum on which the action is built; the actual damage which he has sustained, in many, if not in most cases, exists only in the humanity of the law, which seeks to vindicate his outraged feelings. He comes into the court as a master, he goes before the jury as a father."—Briggs v. Evans, (1844) 27 N. Car. 16. See also Kendrick v. McCrary, (1852) 11 Ga. 603. In sustaining the giving of damages in excess of loss of services and expenses, Lord Ellenborough says, in Irwin v. Dearman, (1809) 11 East 23, 103 Eng. Repr. 912: "However difficult it may be to reconcile to principle the giving of greater damages on the other ground, the practice is become inveterate, and cannot now be shaken."

7—"In cases of this sort, it is

age affect the case, if she is, at the time of the seduction, living as a member of the family of the plaintiff.[8]

The fact that plaintiff's daughter may bring another action against the defendant for breach of promise of marriage is no objection to the maintenance of the action or to the introduction of evidence of the promise of marriage.[9]

230. **Elements of Compensation.**—The plaintiff can recover for the following elements of damage: loss of service caused by the seduction; medical and other expenditures incurred in connection with the lying-in, if pregnancy results from the seduction; dishonor and disgrace to himself and his family; and mental suffering.[10] Under the common law rule that no action can be maintained for seduction unless loss of service is shown, it is clear that there can be no recovery for a seduction followed by no pregnancy or illness and not resulting in any

not necessary to prove an actual contract between the father and the daughter, in order to maintain the action. Before the child attains the age of twenty-one, the law gives the father dominion over her; and after, the law presumes the contract, when the daughter is so situated as to render service to the father, or is under his control; and this it does for the wisest and most benevolent of purposes, to preserve his domestic peace, by guarding from the spoiler the purity and innocence of his child.'' —Lumpkin, J., in Kendrick v. McCrary, supra, citing: Bennett v. Alcott, (1787) 2 T. R. 166, 100 Eng. Repr. 90; Nickleson v. Stryker, (1813) 10 Johns. (N. Y.) 115, 6 Am. Dec. 318; Moran v. Dawes, (1825) 4 Cow. (N. Y.) 412; and other cases.

"''In the case of an action for seduction, it is well settled that no proof of service is necessary beyond that implied from the fact of the daughter's living in her father's house as a member of his family, which, where the daughter is of age, is only a service at will.'' —Noice v. Brown, (1877) 39 N. J. Law 569.

8—Lipe v. Eisenlerd, (1865) 32 N. Y. 229.

9—''If A B brings another action against defendant for the breach of promise of marriage, so much the better; he ought to be punished twice. A B being of the age of 30, is nothing to mitigate damages, or lessen the defendant's fault.''—Tullidge v. Wade, (1769) 3 Wils. 18.

10—Cook v. Bartlett, (1901) 179 Mass. 576, 61 N. E. 266; Coon v. Moffitt, (1809) 3 N. J. Law 583, 4 Am. Dec. 392.

loss of service; and, in such a case, illness resulting from mere worry of the seduced at the publicity given her guilt, is not a proximate result of the seduction.[11]

The cost of the support of an illegitimate child resulting from the seduction, is not a recoverable element of damage in an action for seduction, constituting, as it does, a separate and distinct matter,[12] which is usually made the subject of a separate statutory action in favor of the seduced.

231. **Mitigation.**—Circumstances tending to minimize the loss occasioned by the wrong, are proper to be shown in mitigation of damages, here as elsewhere. Probably the most frequently pleaded fact in mitigation is the lack of chastity of the woman seduced, existing prior to the seduction. If she was unchaste, or was indiscreet in her conversation and conduct with men, or had a reputation for unchastity, it is reasonable to infer that the loss occasioned is not so great as it would have been if she had been of chaste and exemplary character and reputation prior to the seduction.[13] But unchastity subsequent to the seduction cannot be shown in mitigation of damages.[14] Not only does subsequent unchastity fail to indicate any lessening of the damage; but it frequently happens that the seduced becomes unchaste largely if not entirely because of the seduction, merely going along the downward path on which the defendant has started her, so that to permit him to show her subsequent unchastity in mitigation would be to add insult to injury. A previous recovery by the seduced daughter, in her own name, does not mitigate damages, her right, where she has any right, being independent of that of her father and being the

11—Knight v. Wilcox, (1856) 14 N. Y. 413.

12—Sellars v. Kinder, (1858) 1 Head (Tenn.) 134.

13—Stewart v. Smith, (1896) 92 Wis. 76, 65 N. W. 736.

14—Stoudt v. Shepherd, (1889) 73 Mich. 588, 41 N. W. 696.

basis of a distinct and separate action.[15] A subsequent marriage of the seduced with the defendant may be shown in mitigation of damages.[16] It is held that the youthfulness of the defendant may or may not mitigate damages, "according to the other circumstances bearing on his character and surroundings."[17]

232. **Aggravation.**—Circumstances attending the seduction are sometimes important in aggravation of damages, such as the fact that the defendant, subsequently to the seduction, promised to marry the seduced and broke the promise.[18] An attempt of the defendant to perform an abortion on the seduced for the purpose of concealing the seduction, may be shown, where pleaded.[19]

233. **Wealth of Plaintiff and Defendant.**—Evidence of the wealth and social situation of the plaintiff is admissible, in order to show the nature and extent of his loss.[20] As the assessment of exemplary damages is proper, evidence is usually held admissible to show the wealth or poverty of the defendant, in order that the jury may know how large a verdict is necessary in order really to punish him.[21]

234. **Discretion of the Jury.**—The heinous nature of the offense and the fact that most, and usually the chief, elements of damage are non-pecuniary and difficult to estimate with accuracy, tend to broaden the discretionary power of the jury in cases of this kind. Usually, and probably always, it is proper to punish seduction with exemplary damages, and this fact tends to add to the

15—Pruitt v. Cox, (1863) 21 Ind. 15.

16—Eichar v. Kistler, (1850) 14 Pa. St. 282, 53 Am. Dec. 551.

17—Stoudt v. Shepherd, (1889) 73 Mich. 588, 41 N. W. 696.

18—Milliken v. Long, (1898) 188 Pa. 411, 41 Atl. 540.

19—White v. Murtland, (1874) 71 Ill. 250, 22 Am. Rep. 100.

20—White v. Murtland, supra.

21—White v. Murtland, supra.

comparative freedom of the jury's discretion from control of the court. While it cannot be said that the jury has absolutely unlimited discretion as to the amount of its verdict in such cases, it can probably be said with safety that there is no field in which the amount of a verdict is less likely to be interfered with by the court than here.[22]

CASE ILLUSTRATIONS

1. Plaintiff's daughter, twenty-three years old, hired herself out as a servant, and went to live with her master. During her service, she was seduced and rendered pregnant by defendant. Plaintiff received her at home, and maintained her in her lying-in, at his own expense. Held, that the action cannot be maintained, because no loss of service is shown.[23]

2. Plaintiff's unmarried daughter, thirty years old, was seduced by defendant. The only service shown was milking cows. Held, that plaintiff can recover.[24]

3. Plaintiff's minor daughter, with plaintiff's consent, left her father's house without any intention of returning, and with her father's license that she might appropriate her time and services to her own use. Later she was seduced by defendant. Held, that plaintiff may maintain the action. "If it be proper to substitute a constructive for an actual service, to enable the wealthy parent, whose daughter resides with him, to maintain this action when the honor and happiness of his family are assailed by the seducer, it is no less proper that the same substitution should be allowed in favor of the less fortunate father, whose circumstances require the absence of his child from the parental

22—Marshall v. Taylor, (1893) 98 Calif. 55, 32 Pac. 867, 35 Am. St. Rep. 144. "Courts are not disposed to make smooth the ways of the seducer." Here a verdict for $25,000 was upheld.

"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."—Lord Chief Justice Wilmot, in Tullidge v. Wade, (1769) 3 Wils. 18. See also Stevenson v. Belknap, (1858) 6 Ia. 97, 71 Am. Dec. 392.

23—Postlethwaite v. Parks, (1766) 3 Burr. 1878, 97 Eng. Repr. 1147.

24—Bennett v. Alcott, (1787) 2 T. R. 166, 100 Eng. Repr. 90.

roof, in order to enable him by the same means to protect himself and family from the same misfortune.'' [25]

4. Defendant, a man of wealth and years, seduced and impregnated plaintiff, who was less than seventeen years old. Damages in the sum of $25,000 are not excessive.[26]

25—Boyd v. Byrd, (1846) 8 Blackf. (Ind.) 113, 44 Am. Dec. 740.

26—Marshall v. Taylor, (1893) 98 Calif. 55, 32 Pac. 867, 35 Am. St. Rep. 144. Contrary to the rule of the common law, the seduced was here allowed to maintain an action herself, under a state statute. The measure of damages, in such a case, is naturally larger, other things being equal, than it would be if a parent were bringing the action.

CHAPTER L

Criminal Conversation

235. **In General.**—Adultery, when considered as a tort for which the wronged husband may recover, is known as criminal conversation. The gist of the action for this wrong is interference with the husband's exclusive right of *consortium*. The action is not founded on loss of services, as is an action for seduction, and it is not essential to the maintenance of the action that pecuniary loss of any kind be shown. Even where there is no resulting expense and no loss of services, substantial damages may be recovered for the commission of adultery by the defendant with the plaintiff's wife.[1]

If the plaintiff has connived at the particular acts of adultery alleged or has suffered his wife to live as a prostitute, he cannot recover, as it is *damnum absque injuria*.[2] The old maxim, "*volenti non fit injuria*," fits such a case. But the fact that the plaintiff is living away from his wife and is even leading a dissolute life, does not bar his action.[3] Even the fact that the wife has since obtained a divorce from the plaintiff is no defense.[4]

It is not essential to a plaintiff's right of action that he prove alienation of his wife's affections.[5]

1—Sikes v. Tippins, (1890) 85 Ga. 231, 11 S. E. 662; Yundt v. Hartrunft, (1866) 41 Ill. 9; Shannon v. Swanson, (1904) 208 Ill. 52, 69 N. E. 869; Adams v. Main, (1892) 3 Ind. App. 232, 29 N. E. 792; Bigaouette v. Paulet, (1883) 134 Mass. 123, 45 Am. Rep. 307; Rinehart v. Bills, (1884) 82 Mo. 534, 52 Am. Rep. 385.

2—Cook v. Wood, (1860) 30 Ga. 891, 76 Am. Dec. 677.

3—Browning v. Jones, (1894) 52 Ill. App. 597.

4—Michael v. Dunkle, (1882) 84 Ind. 544, 43 Am. Rep. 100.

5—Stark v. Johnson, (1908) 43 Colo. 243, 95 Pac. 930, 16 L. R. A. (N. S.) 674.

The action cannot be maintained by a wife against another for carnally knowing her husband.[6]

Evidence of the financial conditions of plaintiff and defendant is admissible here for the same reasons as in seduction.[7]

236. **Elements of Compensation.**—Compensatory damages for criminal conversation include compensation for the following elements: loss of *consortium* or conjugal association, loss of the wife's affections, mental suffering of the plaintiff, disgrace and humiliation, reasonable expenditures which have resulted proximately from the defendant's wrong, and the net pecuniary value of the services of the wife, which is the gross value of such services, minus the cost of the support which the husband is under a duty to give the wife.[8] The action is grounded in disturbance of the family relations and loss of *consortium;* but loss of services or diminution in their value may be an element of damage.[9] Some authorities, as in breach of promise, add "injury to the affections" of the plaintiff.[10] Although loss of affections is an element of damage to be compensated for, it is not the gist of the action. It has been held that it is only a matter of aggravation.[11]

6—"A wife's infidelity may impose upon her husband the support of another man's child, and, what is still worse. it may throw suspicion upon the legitimacy of his own children. A husband's infidelity can inflict no such consequences upon his wife."—Doe v. Roe, (1890) 82 Me 503, 20 Atl. 83, 8 L. R. A. 833, 17 Am. St. Rep. 499. But the wife may maintain an action against another woman for the alienation of her husband's affections. See next chapter.

7—See § 233.

8—Prettyman v. Williamson, (1898) 1 Pen. (Del.) 224, 39 Atl. 731. The right of the plaintiff to recover for mental suffering is well settled. Stark v. Johnson, (1908) 43 Colo. 243, 95 Pac. 930, 16 L. R. A. (N. S.) 674, 15 Ann. Cas. 868; Browning v. Jones, (1893) 52 Ill. App. 597; Smith v. Meyers, (1897) 52 Neb. 70, 71 N. W. 1006; Cross v. Grant, (1883) 62 N. H. 675, 13 Am. St. Rep. 607.

9—Adams v. Main, (1892) 3 Ind. App. 232, 29 N. E. 792.

10—See Willis on Damages, p. 182. See also treatment of this element in breach of promise, § 163.

11—Evans v. O'Connor, (1899)

237. **Mitigation.**—On the general principle that evidence of facts showing the amount of plaintiff's loss is admissible, the defendant has a right to introduce evidence tending to show that such loss is not great. So, if the *consortium* in question has already been rendered of less value by reason of criminal conversation with third parties, accomplished previously to the wrong of the defendant, or if the wife has been unchaste before defendant's wrongful act, it is apparent that plaintiff's loss is not so great as it would otherwise have been, and therefore evidence of such previous criminal conversation with others or unchastity, is admissible in mitigation of damages.[12] The unchaste conduct of the wife with third persons after the wrongful act of defendant, does not mitigate damages, but may enhance them.[13] Where plaintiff's wife was not seduced by the arts of defendant, but was really active herself in bringing about the illicit relations complained of, this fact may be shown in mitigation of damages.[14]

The fact that the defendant did not know that the plaintiff's wife was a married woman, may be considered in mitigation of damages,[15] but it would seem that this should mitigate only exemplary, and not compensatory, damages.

The plaintiff's laxity in caring for his wife's chastity may be shown in mitigation, where his conduct does not amount to a consent so as to bar the action.[16]

Condonation of the wrong by the husband may be considered in mitigation of damages. Usually, loss of society, fellowship and assistance of the wife is charged. If

174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316.

12—Harrison v. Price, (1864) 22 Ind. 165.

13—Smith v. Hockenberry, (1904) 138 Mich. 129, 101 N. W. 207.

14—Smith v. Hockenberry, (1906) 146 Mich. 7, 109 N. W. 23, 10 Ann. Cas. 60, 117 Am. St. Rep. 615.

15—Lord v. Lord, [1900] P. 297, 69 L. J. P. 54.

16—Bunnell v. Greathead, (1867) 49 Barb. (N. Y.) 106.

condonation has rendered this loss but temporary, the damage is less.[17]

The jury may consider in mitigation the fact that the plaintiff and his wife sustained unhappy relations with each other previously to the wrong in question, or that the plaintiff's wife was wanting in affection for the plaintiff.[18] In an action by the husband, it may be shown in mitigation of damages that the plaintiff deserted his wife before the commission of the wrong.[19] Of all the facts that can be shown in mitigation of damages, probably none more clearly and certainly mitigates than does this. The fact of desertion indicates that the husband placed a very low value upon the marriage, and furthermore he himself made the marriage less valuable than ever, abandoning his principal right thereunder—the right to the society of his wife. It is also held that the fact that the plaintiff has, after the commission of the wrong, divorced his wife, may be considered in mitigation of damages.[20] Failure of the plaintiff to support his wife also mitigates damages.[21] So does the fact that he is living apart from her.[22]

238. **Similar Wrongs by Others and Actions Against Them Not a Bar.**—Although the fact of previous criminal conversation of third persons with plaintiff's spouse is admissible in mitigation of damages, it is not a bar to the action; nor is the fact that a judgment for such wrong by third persons has been had or a settlement made. The wrongful acts of defendant and third persons are sepa-

17—Morning v. Long, (1899) 109 Ia. 288, 80 N. W. 390; Ball v. Marquis, (1904) 122 Ia. 665, 98 N. W. 496; Smith v. Hockenberry, (1906) 146 Mich. 7, 109 N. W. 23, 10 Ann. Cas. 60.

18—Palmer v. Crook, (1856) 7 Gray (Mass.) 418; Hadley v. Heywood, (1876) 121 Mass. 236; Cross v. Grant, (1883) 62 N. H. 675, 13 Am. St. Rep. 607.

19—Browning v. Jones, (1893) 52 Ill. App. 597.

20—Prettyman v. Williamson, (1898) 1 Pen. (Del.) 224, 39 Atl. 731.

21—Id.

22—Id.

rate and distinct torts, and no right of action accrues against the separate tort feasors jointly. "There being no joint liability, the doctrine that satisfaction by one joint tort feasor bars recovery against all others of such tort feasors has no application."[23]

239. **Discretion of the Jury.**—In cases of criminal conversation, as in all others wherein the damage is largely non-pecuniary, the jury may exercise a very broad discretion as to the amount of damages, and there seems to be great reluctance on the part of any court, in these cases, to interfere with verdicts for large sums.[24] Besides the non-pecuniary nature of a large portion of the loss occasioned, the further fact that exemplary damages are usually, and probably always, proper in cases of criminal conversation, in jurisdictions wherein such damages are allowed at all, tends to make courts pause in setting aside large verdicts in cases of this heinous offense.[25] In such cases, damages are not easily calculated in dollars and cents; each case must depend upon its own facts, which it is within the province of the jury to find; each case must depend upon its own circumstances of aggravation; each case is affected by the social position of the parties and their pecuniary situation; so that it is exceedingly difficult for a court to say, in most instances, that the jury has placed the damages at an excessive amount.

CASE ILLUSTRATIONS

1. A sues B for criminal conversation. B pleads that his brother, C, also had intercourse with plaintiff's wife, for which

23—Shannon v. Swanson, (1904) 208 Ill. 52, 69 N. E. 869.

24—Wales v. Miner, (1883) 89 Ind. 118; Billings v. Albright, (1901) 73 N. Y. Supp. 22, 66 App. Div. 239; Vollmer v. Stregge, (1914) 27 N. Dak. 579, 147 N. W. 797, in which it was held that a verdict for $1,000 was so small as to indicate no passion or prejudice; Speck v. Gray, (1896) 14 Wash. 589, 45 Pac. 143.

25—Prettyman v. Williamson, (1898) 1 Pen. (Del.) 224, 39 Atl.

a settlement was had between plaintiff and C, and insists that these facts bar the action. C's wrongful acts, being separate and distinct from those of defendant, the fact of his wrong and the settlement therefor do not constitute a bar to an action against defendant.[26]

2. A sues B for having criminal conversation with A's wife. Defendant offers to prove that plaintiff treated his wife with intolerable severity. Held, that this fact is admissible in mitigation of damages, but not in bar of the action.[27]

731; Matheis v. Mazet, (1894) 164 Pa. 580, 30 Atl. 434; Joseph v. Naylor, (1917) 257 Pa. 561, 101 Atl. 846.

26—Shannon v. Swanson, (1904) 208 Ill. 52, 69 N. E. 869.

27—Jenness v. Simpson, (1911) 84 Vt. 127, 78 Atl. 886.

CHAPTER LI

Enticement of Spouse and Alienation of Affections

240. **In General.**—Closely related to, and blending into, the field of criminal conversation, is the action for enticing away, or alienating the affections of, the plaintiff's spouse. Sexual intercourse between the defendant and the plaintiff's spouse is not, however, essential to the maintenance of the action; and such a wrong, if made the principal ground of an action, really indicates an action for criminal conversation.

A husband may maintain an action for the enticing away, or alienation of the affections, of his wife;[1] and a wife may maintain a similar action for an enticement or alienation of her husband.[2]

241. **Elements of Compensation.**—A husband is entitled to the *consortium* and services of his wife. Where she is wrongfully induced to leave him, he is entitled to compensation for the loss of these elements; but it must always be borne in mind, in assessing damages, that these rights are burdened with the obligation to clothe, support,

1—Rinehart v. Bills, (1884) 82 Mo. 534, 52 Am. Rep. 385; Holtz v. Dick, (1884) 42 O. St. 23, 51 Am. Rep. 791.

2—Mehrhoff v. Mehrhoff, (1886) 26 Fed. 13; Foot v. Card, (1889) 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258; Haynes v. Nowlin, (1891) 129 Ind. 581, 29 N. E. 389; Price v. Price, (1894) 91 Ia. 693, 60 N. W. 202; Daywitt v. Daywitt, (Ind. App. 1917) 114 N. E. 694; Nichols v. Nichols, (1893) 147 Mo. 387, 48 S. W. 947; Hodgkinson v. Hodgkinson, (1895) 43 Neb. 269, 61 N. W. 577, 27 L. R. A. 120, 47 Am. St. Rep. 759; Jaynes v. Jaynes, (1886) 39 Hun (N. Y.) 40; Bennett v. Bennett, (1889) 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Westlake v. Westlake, (1878) 34 O. St. 621. Contra: Duffies v.

cherish, and care for her in sickness and in health.[3]

Where a wife brings her action, one of the elements for which she may recover is loss of support and another is loss of society.[4]

Mental suffering is a recoverable element of damage, in most and probably all of these cases, proceeding, as it does, both naturally and proximately from the wrong.[5]

Where defendants alienated the affections of plaintiff's husband, causing him to convey his land to them and to abscond, and plaintiff, unable to locate her husband, procured a legal separation, but did not do so because of any desire to live apart from him, it was held that plaintiff's loss of his society before the decree of separation and her permanent loss of his society afterward could be taken into account in assessing damages.[6]

In an action for alienation of affections, damages cannot be assessed for an assault and slights and indignities inflicted by defendants upon plaintiff prior to their wrongful act of alienating the husband's affections,[7] and it would seem that, even if these wrongs were contemporaneous with that of alienating the affections, it would still be impossible to compensate for them in this action. They might, if accompanying the wrong, be considered as circumstances aggravating damages, but such wrongs as assaults constitute independent causes of action.

242. **Mitigation.**—All circumstances tending to make the resulting damage less may be considered in mitigation of damages. The fact of lack of harmony between husband and wife makes the married relation and the affections of less value, and so may be shown in mitigation of

Duffies, (1890) 76 Wis. 374, 45 N. W. 522, 8 L. R. A. 420, 20 Am. St. Rep. 79.

3—Rudd v. Rounds, (1892) 64 Vt. 432, 25 Atl. 438.

4—See cases cited supra, **note 2.**

5—Long v. Booe, (1894) 106 Ala. 570, 17 So. 716.

6—Wilson v. Coulter, (1898) 51 N. Y. Supp. 804, 29 App. Div. 85.

7—Smith v. Smith, (1916) 192 Mich. 566, 159 N. W. 349.

damages.[8] If such affections have never been strong, it naturally follows that the loss of the affections cannot have been so large an element of damage to the plaintiff as it would have been if the affections had been ardent. The same is true of previous adultery of plaintiff's spouse with a person other than defendant.[9] It is held that the bad character of the plaintiff may be shown in mitigation of damages.[10]

The fact that a reconciliation between plaintiff and his wife has taken place since the offense, is proper to consider in mitigation of damages. Such reconciliation makes the loss of *consortium* temporary, so that the damage is less than it would be if the loss were permanent.[11] The relation of parent, brother or sister, existing between the defendant and the plaintiff's spouse may mitigate damages.[12]

243. **Action Against Parents, Brothers or Sisters of Alienated Spouse.**—In these cases, there is more of difficulty in maintaining an action against the parents, brothers or sisters of the alienated spouse than there would be in suing other persons guilty of the same act. The advice of a parent to his child or of a brother or sister to a brother or sister to leave the husband or wife, is held not to be actionable unless malicious, as it is presumed that a parent, brother or sister will take such action only because of his desire to do that which is best for his kin.[13] But this amounts only to a presumption,

8—Durning v. Hastings, (1897) 183 Pa. 210, 38 Atl. 627.

9—Angell v. Reynolds, (1904) 26 R. I. 160, 58 Atl. 625, 106 Am. St. Rep. 707.

10—Bailey v. Bailey, (1895) 94 Ia. 598, 63 N. W. 341.

11—Rehling v. Brainard, (1914) 38 Nev. 16, 144 Pac. 167.

12—Ray v. Parsons, (1915) 183 Ind. 344, 109 N. E. 202.

13—"There is a presumption that a parent's action towards a daughter is inspired by a proper regard for the welfare and happiness of the daughter, and before a recovery can be had in this class of cases there must be evidence sufficient, not only to overcome this presumption, but to establish that the parent acted maliciously. If the parental affection for a daughter, manifested by the wish that the daughter might be near them, so

and does not bar the action if there be malice.[14]

244. **Exemplary Damages.**—Where the defendant's conduct in bringing about the alienation has been wanton, high-handed, or malicious, exemplary damages may be assessed.[15]

245. **Discretion of the Jury.**—The losses growing out of enticement of a spouse or alienation of the affections, include both pecuniary and non-pecuniary elements, and both kinds of elements are often difficult of measurement in these cases. Great damage is often wrought. Aggravating circumstances often accompany the wrong. Under these conditions, it is not surprising that very large damages are frequently given, with very little probability that they will be set aside. The discretion of the jury is very broad, although of course not without limit.[16]

CASE ILLUSTRATIONS

1. Plaintiff brings action against another woman for alienating the affections of plaintiff's husband. "The defendant offered to prove, in substance, that plaintiff's husband had been improperly familiar with other women than herself during the same period that she was charged with having maintained illicit

that she could be properly cared for, and have a warm and comfortable home in which she could be properly nursed back to health, should be held to be actionable, then parental affection counts for naught, and the tender solicitude of the mother for her daughter must be severed at the daughter's marriage altar, a condition that is inconceivable either in law or morals."—Ray v. Parsons, (1915) 183 Ind. 344, 109 N. E. 202.

14—Luick v. Arends, (1911) 21 N. Dak. 614, 132 N. W. 353.

15—Waldron v. Waldron, (1890) 45 Fed. 315; Nevins v. Nevins, (1904) 68 Kan. 410, 75 Pac. 492; Hartpence v. Rodgers, (1898) 143 Mo. 623, 45 S. W. 650; White v. White, (1909) 140 Wis. 538, 122 N. W. 1051.

16—Weber v. Weber, (1914) 113 Ark. 471, 169 S. W. 318, Ann. Cas. 1916 C 743, holding $2,700 not excessive; De Ford v. Johnson, (Mo. 1915) 177 S. W. 577, allowing $7,400; Phelps v. Bergers, (1913) 92 Neb. 851, 139 N. W. 632, verdict for $16,666.67 held excessive; Phillips v. Thomas, (1912) 70 Wash. 533, 127 Pac. 97, verdict for $35,000 reduced to $25,000.

relations with him, and hence that she was not responsible, in any event, for all the damages which the plaintiff had sustained in the premises. * * * However ungracious, or even odious, such a defense may seem to be from a purely moral standpoint, it is doubtless one which a defendant may interpose in an action of this sort."[17]

2. Plaintiff sues defendant for alienation of her husband's affections. Recovery may be had for loss of support, if the value of such support is shown. Damages may be assessed also for mental suffering and loss of society; and the amount to be allowed for these latter elements, since they are non-pecuniary, is largely in the discretion of the jury, which, however, should consider the circumstances of the case.[18]

17—Angell v. Reynolds, (1904) 26 R. I. 160, 58 Atl. 625, 106 Am. St. Rep. 707.

18—Rice v. Rice, (1895) 104 Mich. 371, 62 N. W. 833.

CHAPTER LII

Interference with the Right of Privacy

246. **In General.**—Recent years have seen the recognition, by some courts, of a tort formerly unknown or, at any rate, unrecognized. That tort is interference with one's right of privacy, or, to be more exact, one's right not to be brought before the attention of the public or to be left alone.[1] Not all courts recognize the existence of such a right. Most of the cases on the subject are not very satisfactory, as they involve the essential elements of libel, so that there would be a right of action irrespective of the existence of a right of privacy. This field is thus far so little developed that it is impossible to say what are all of the methods in which one may wrongfully interfere with this right, or just what the degree of interference must be in order to afford a cause of action, or just what the elements of damage are. The usual means of bringing up the question of the existence of a right of privacy is a suit to enjoin the unauthorized publication of

1—Recognizing the right of privacy: Pavesich v. New England Life Insurance Co., (1905) 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Am. & Eng. Ann. Cas. 561; Foster-Milburn Co. v. Chinn, (1909) 134 Ky. 424, 120 S. W. 364, 34 L. R. A. (N. S.) 1137; Edison v. Edison Polyform Mfg. Co., (1907) 73 N. J. Eq. 136, 67 Atl. 392. Contra: Roberson v. Rochester Folding Box Co., (1902) 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478, 89 Am. St. Rep. 828 (3 JJ. dissenting); Henry v. Cherry, (1909) 30 R. I. 13, 73 Atl. 97, 24 L. R. A. (N. S.) 991; Hillman v. Star Pub. Co., (1911) 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595. The rule stated in the Roberson Case has been abrogated in New York by a statute, under which has grown up a considerable body of case law on the question what is included in the right of privacy intended to be protected by the enactment and the further question what constitutes a violation of it.

one's picture or an action for damages for such publication. Courts permitting an action for the violation of the right of privacy say that proof of special damage is unnecessary.

Where the right of privacy is conceded at all, it seems to exist in varying degree in favor of different persons who have surrendered none of the right or a small part of it or a large part; and so a very important question to be settled at the threshold of any case is whether there has been any wrongful invasion of privacy not surrendered by the plaintiff. Men who have entered public life have surrendered much of their right of privacy.

247. **Elements of Damage.**—Probably all the proximate damage in most cases would be non-pecuniary and very much in the discretion of the jury. The loss of privacy itself seems to constitute an element of damage. It seems safe to say that the other principal elements of damage are: injury to reputation, if any; humiliation; and mental suffering.[2]

There seems to be no reason why the subject should not be governed by the usual rules of proximate cause, mitigation, aggravation, and exemplary damages.

CASE ILLUSTRATIONS

1. Defendants, without plaintiff's permission, published in a life insurance advertisement a picture of plaintiff by the side of a picture of an ill-dressed and sickly-looking person. Above plaintiff's picture was the inscription: "Do it now. The man who did." Above the other picture were the words: "Do it while you can. The man who didn't." Below was the state-

2—"In an action for an invasion of such right the damages to be recovered are those for which the law authorizes a recovery in torts of that character, and, if the law authorizes a recovery of damages for wounded feelings in other torts of a similar nature, such damages would be recoverable in an action for a violation of this right."—Pavesich v. New England Life Insurance Co., (1905) 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

ment: "These two pictures tell their own story." Under plaintiff's picture was the statement: "In my healthy and productive period of life I bought insurance in the N. Co.," etc. Plaintiff's name did not appear in the advertisement. Plaintiff had never insured in the N. Co. Held, that plaintiff has a cause of action, and that wounded feelings constitute an element of damage.[3]

2. Defendants purchased of plaintiff the right to make and sell a pain killer prepared according to a formula originated by plaintiff. Without authority from plaintiff, they used his name as part of their corporate title, and placed plaintiff's picture and a supposed statement and signature of plaintiff on every bottle. Held, that this is a violation of the right of privacy.[4]

3—Pavesich v. New England Life Insurance Co., supra.

4—Edison v. Edison Polyform Mfg. Co., (1907) 73 N. J. Eq. 136, 67 Atl. 392.

CHAPTER LIII

Death by Wrongful Act

248. **At Common Law.**—No recovery can be had, at the common law or in admiralty, for death by defendant's wrongful act.[1] "According to the principles of the common law, injuries affecting life cannot, in general, be the subject of a civil action."[2] The reasons assigned for such a rule are not always the same, nor are they always satisfactory, and the principle has been recognized by American courts more because of the fact that it is firmly established by precedent than because it is based upon any sufficient reason.[3] Some of the early English cases say that there can be no civil recovery for wrongful death, because defendant's act giving rise to the claim is a criminal offense, "an offense to the Crown, being converted into felony, and that drowns the particular offense," and

1—Higgins v. Butcher, (c. 1600) Yelverton 89, 80 Eng. Repr. 61; Smith v. Sykes, (1677) 1 Freem. K. B. 224, 89 Eng. Repr. 160; Baker v. Bolton, (1808) 1 Camp. 493; Grosso v. Delaware, L. & W. R. Co., (1888) 50 N. J. Law 317, 13 Atl. 233; Carey v. The Berkshire R. Co., (1848) 1 Cush. (Mass.) 475; Whitford v. Panama R. Co., (1861) 23 N. Y. 465; Green v. Hudson River R. Co., (1858) 28 Barb. (N. Y.) 9. But, in Ford v. Monroe, (1838) 20 Wend. (N. Y.) 210, the plaintiff was allowed to recover at common law for the negligent killing of his infant son. The case is, as Christiancy, J., says, in Hyatt v. Adams, (1867) 16 Mich. 180, 190, "very generally admitted not to be law." The weight of the decision in Ford v. Monroe as authority, is somewhat lessened anyway by the fact that the defendant seems not to have questioned the general right of the plaintiff to maintain the action.

2—Eden v. Lexington, etc., R. Co., (1853) 53 Ky. (14 B. Mon.) 165, 167.

3—In Holmes v. O. & C. Ry. Co., (1881) 6 Sawyer 662, 5 Fed. 75, 79, an admiralty case, the court admits that the common law permits no recovery of damages for wrongful death, but expressly refuses to admit that the rule is founded in reason or consonant with justice.

that the civil action is thereby lost.[4] How this reason can apply to a purely negligent killing, as, for instance, by a railroad company at a crossing, where no felony is involved, has never been made clear, and probably cannot be made so. It was also said that the tort, being personal to the deceased, is dead with him.[5]

After conceding that arguments in favor of a recovery would be plausible if the question were being considered for the first time, Bacon, J., in Green v. The Hudson River Co.,[6] says: "But I suppose the question has been too long settled, both in England and in this country, to be disturbed, and that it would savor somewhat more of judicial knight errantry, than of legal prudence, to attempt to unsettle what has been deemed at rest for more than two hundred and fifty years."[7]

249. Actions for Wrongful Death, Under Modern Statutes.—There being no common law cause of action for wrongful death, legislatures have remedied this glaring defect by two methods: first, by providing that tort actions shall survive to the personal representative of a deceased person; and second, by creating a new cause of action for a wrongful act causing death, for the benefit of certain classes of persons. The second type of action is usually authorized to be brought by the administrator, for the benefit of persons who would have been beneficially affected by a continuance of the life of the deceased. Such a right of action is one given the administrator in

4—Smith v. Sykes, supra, note 1; and Higgins v. Butcher, ibid.

5—Higgins v. Butcher, (c. 1600) Yelverton 89, 80 Eng. Repr. 61.

6—(1858) 28 Barb. (N. Y.) 9.

7—It is, however, interesting to notice that, according to very early English law, later fallen into disuse, stated compensation was given for human life. See 41 L. R. A. 813, note, referring to articles in 5 Case & Comment 15, and 12 Cent. L. J. 465. See also Maitland's "Doomesday Book and Beyond." The student will find it worth while to read the entire note, "Common Law Right of Action of Parent for Loss of Services of Child Killed," 41 L. R. A. 807 et seq.

behalf of dependent wife or children of the deceased, for loss of support, or in behalf of an heir for additions which deceased would have made to his estate and passed on to such heir if deceased had lived. A parent also is given a right of recovery for loss of services of his deceased child, by modern statutes.

The question whether a judgment in favor of the personal representative under a statute providing a mere survival of the right of action of the deceased will bar an action by such representative for the loss sustained by relatives, where both kinds of action are allowed, is a troublesome question, on which the courts are divided. On principle, it would seem that, although the two actions grow out of the same wrongful act, the surviving right of the deceased and the right of his relatives are separate and distinct rights; and, as we shall see, the fact that they are even based upon different theories is well demonstrated by the different rules as to measure of damages in the two kinds of action. A survival of the right of action of the deceased for his injury is one thing; the accrual of a right of action to specified beneficiaries by reason of the loss of benefits which would have accrued to them but for the wrongful death of the deceased, is quite another thing; so it would seem natural to suppose that the procuring of a judgment or the maintenance of one of these actions would have no relation to the possibility of maintaining an action of the other kind.[8]

8—In holding that both actions may be maintained, the Wisconsin court says: "The language of the two provisions is plain. They refer to entirely distinct losses recoverable in different rights,—the one in the right of the deceased for the loss occasioned to him; the other in the right of the surviving relatives for the loss to them. Both are dependent on the injury, but only one dependent on the death with surviving relatives to take under the statute."—Brown v. Chicago & N. W. Ry. Co., (1898) 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579, 5 Am. Neg. Rep. 255. Stewart v. United Electric Light Co., (1906) 104 Md. 332, 65 Atl. 49, 8 L. R. A. (N. S.) 384. But see Louisville & N. R. Co. v. McElwain, (1896) 98 Ky. 700, 18 Ky. Law 379, 34 S. W. 236, 34 L. R. A. 788, 56 Am. St. Rep. 385.

Where a mere survival of the right of action of the deceased is provided for by a statute, only such elements of damage as would have been recoverable by the deceased can be recovered by his personal representative.[9] A judgment so recovered becomes assets of the estate. But if the purpose of the statute is to compensate the dependent relatives or relatives entitled to the services of the deceased, for the loss which they have suffered, by giving an entirely new right of action, the measure of damages is different. The amount which would have compensated the deceased is then entirely immaterial; the question is wholly one as to the amount of damage suffered by the relatives in whose behalf the suit is maintained.[10] None except pecuniary damage is compensated

Notice also the view set forth in Holton v. Daly, (1882) 106 Ill. 131: "The cause of action is plainly the wrongful act, neglect or default causing death, and not merely the death itself." The writer submits that this proposition is not so sound as that quoted above from the Brown case. See notes, 34 L. R. A. 788, and 8 L. R. A. (N. S.) 384.

"The death loss act of the English statute (9 & 10 Vict. 93), commonly called 'Lord Campbell's Act,' and the various laws of a similar kind that have been modeled after it, gave a new cause of action unknown to the common law, for the benefit of certain designated classes of surviving relatives. Such relatives do not take the cause of action for damages to the deceased by transfer to them by operation of law, or otherwise, but are enabled by statute to recover the pecuniary loss to themselves caused by the wrongful taking off of the decedent, the continuation of whose life would have been beneficial to them."—Brown v. Chicago & N. W. Ry. Co., supra. Strangely enough, the theory that Lord Campbell's Act and similar statutes create an entirely new cause of action, is characterized as "mistaken," in L R. A. 1916 C 973, note.

The difference between the two types of action sometimes becomes very important. If the statute provides merely for survival of the action, a release by deceased bars action; but if an entirely new action is provided, in favor of certain classes of beneficiaries, by the better view, a release by the deceased constitutes no bar, since he cannot have given an effective release of a claim not his own. Earley v. Pacific El. R. Co., (Cal. 1917) 167 Pac. 513. See note on this case, 27 Yale L. J. 275.

9—Broughel v. Southern New England Tel. Co., (1901) 73 Conn. 614, 46 Atl. 827.

10—"The cause of action thereby given is not to the estate of the

for in such actions.[11] The mental or physical suffering of the deceased or of his surviving relatives is not a basis of damages. Loss of support or service, and not relationship, is the principal basis of the usual statutory right of action. The value of the support lost by the dependents can, of course, be only estimated. In arriving at such value, it is proper to consider the age, capacity, character, habits, health, and probable expectation of life of the deceased at the time of his fatal injury, and also the period of time during which the dependents would have been likely to receive support from him, had he not been

deceased person, but to his or her representatives as trustees, not for purposes of general administration, but for the exclusive use of specified beneficiaries. * * * The wrong defined indicates no injury to the estate of the person killed, and cannot, either logically or legally, be said to affect any property rights of such person, unless it can be maintained that a person has a property right in his own existence. The property right, therefore, created by this statute is one existing in favor of the beneficiaries of a recovery only, and depends for its existence upon the death of the party injured. It had no previous life and cannot be said to have been injured by the very act which creates it. Whatever claim a wife or children have at law upon the husband and father for support perishes with the life of such person, and thereafter their claims upon his estate are governed by statutory rules.''—Hegerich v. Keddie, (1885) 99 N. Y. 258, 1 N. E. 787. See also Smith v. Lehigh Valley R. Co., (1904) 177 N. Y. 379, 69 N. E. 729.

11—Smith v. Lehigh Valley R. Co., supra; Illlinois Central R. Co. v. Barron, (1866) 5 Wall. (U. S.) 90, 18 L. ed. 591; Munro v. Pacific Dredging, etc., Co., (1890) 84 Calif. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Morgan v. Southern Pacific Co., (1892) 95 Cal. 510, 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143; Denver & R. G. R. Co. v. Spencer (1900) 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121; Louisville, N. A. & C. Ry. Co. v. Rush, (1890) 127 Ind. 545, 26 N. E. 1010; Hurst v. Detroit City Ry. Co., (1891) 84 Mich. 539, 48 N. W. 44; Schaub v. Hannibal & St. J. R. Co., (1891) 106 Mo. 74, 16 S. W. 924; Tilley v. Hudson River R. Co., (1862-1864) 24 N. Y. 471, 29 N. Y. 252, 86 Am. Dec. 297; Davis v. Guarnieri, (1887) 45 O. St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Pennsylvania R. Co. v. Goodman, (1869) 62 Pa. 329. So held also under Lord Campbell's Act itself, Blake v. Midland Ry. Co., (1852) 18 Q. B. 93, 21 L. J. Q. B. 237; 118 Eng. Repr. 35, 88 Rev. Rep. 543; and likewise as to damages for wrongful death, under federal employers' liability act, McCoullough v. Chicago, R. I. & P. Ry. Co., (1913) 160 Ia. 524, 142 N. W. 67.

killed.[12] In calculating damages for wrongful death, it is not proper to take into consideration earnings of the deceased in an illegal occupation; but the mere fact that he has, in connection with his regular and lawful business, done things that are unlawful or immoral, does not interfere with the right to introduce evidence as to his lawful earnings in his regular business.[13]

Funeral expenses of the person wrongfully killed would seem to be as clear a pecuniary loss as could be conceived of, and they are usually allowed as an element of damage.[14]

Pecuniary loss to plaintiff does not depend upon any legal liability of the deceased to support plaintiff. "There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."[15] If plaintiff had a reasonable ex-

12—"In but few cases arising under this act is the plaintiff able to show direct, specific pecuniary loss suffered by the next of kin from the death, and generally the basis for the allowance of damages has to be found in proof of the character, qualities, capacity and condition of the deceased, and in the age, sex, circumstances and condition of the next of kin. The proof may be unsatisfactory, and the damages may be quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can."—Lockwood v. New York, L. E. & W. R. Co., (1885) 98 N. Y. 523. See also Macon & W. R. Co. v. Johnson, (1868) 38 Ga. 409; and Chicago & A. R. Co. v. Shannon, (1867) 43 Ill. 338. In Railroad Co. v. Baches, (1870) 55 Ill. 379, and in many other cases, it is held that the wealth or poverty of the widow or next of kin cannot be considered in assessing damages, although many cases hold that the "age, sex, circumstances and condition of the next of kin" may be considered, as does the Lockwood case supra.

13—Richardson v. Sioux City, (1915) 172 Ia. 260, 154 N. W. 430, Ann. Cas. 1918 A 618.

14—Hollyday v. The Steamer David Reeves, (1879) 5 Hughes (U. S.) 89; Pennsylvania Co. v. Lilly, (1881) 73 Ind. 252; Rains v. St. Louis, etc., R. Co., (1879) 71 Mo. 164, 36 Am. Rep. 459; Pack v. Mayor of New York, (1850) 3 N. Y. 489. Contra: Clark v. London General Omnibus Co., Limited, (1906) 2 K. B. 648, 6 Ann. Cas. 198. See collection of citations, 6 Ann. Cas. 201 note.

15—Michigan Central R. Co. v. Vreeland, (1913) 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. 192, Ann. Cas. 1914 C 176.

pectation of assistance from the deceased during the remainder of his life, such as can be measured in money, he has a right of action.[16]

Where a parent or husband of deceased sues for loss of services, the same principles govern as in the common law action for loss of services.[17]

Another element of damages, sometimes allowed, and sometimes not, is the loss of the opportunity to inherit from the deceased a sum which he would have made had he not been killed, and which would have been inherited by the heir bringing the action. Here also the damages are more or less conjectural; but this does not prevent a recovery of what is, under all circumstances shown by the evidence, a reasonable amount, according to some holdings.[18]

Usually, statutes allowing recovery for wrongful death authorize the awarding of damages only for a loss actually sustained and only damages commensurate with the loss. But where a wrongful death statute merely names a penal sum recoverable by certain relatives, no question as to measure of damages is presented, and it is error to consider the amount of the actual damage suffered by the plaintiff and to give a verdict in a smaller or larger sum than the penal sum named in the statute.[19]

250. **Mitigation.**—As in other fields, evidence tending to lessen or increase the plaintiff's loss is generally admissible; but facts wholly independent of the death and not in any way affecting the amount of the loss at the time of its occurrence, are not admissible in mitigation.

16—Hirschkovitz v. Pennsylvania R. Co., (1905) 138 Fed. 438; Fowler v. Chicago, etc., Ry. Co., (1908) 234 Ill. 619, 85 N. E. 298; Bremer v. Minneapolis, etc., Ry. Co., (1905) 96 Minn. 469, 105 N. W. 494.

17—See Telfer v. Northern R. Co., (1862) 30 N. J. Law 188.

18—Allowed: Demarest v. Little, (1885) 47 N. J. Law 28. Contra: Wiest v. Electric Traction Co., (1901) 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666; Rochester v. Seattle, R. & S. Ry. Co., (1913) 75 Wash. 559, 135 Pac. 209.

19—"By the terms of the statute, and as it is administered in

The fact that plaintiff may have, in some degree, compensated himself for the loss of husband or wife, by marrying again, does not mitigate damages.[20] Neither are damages mitigated by the fact that the life of the deceased was insured in favor of the plaintiff.[21]

251. **Evidence of the Poverty of the Plaintiff Usually Inadmissible.**—The only question for the jury to consider in estimating damages is the question of the extent of pecuniary injury to the persons in whose favor the right of action has been given and by whom it is being prosecuted; and, as this cannot, under ordinary circumstances, depend upon the plaintiff's being poor or disabled, evidence of these facts is not usually held admissible.[22]

252. **Certainty.**—Only reasonable certainty of proof is required in order to set the measure of damages. The fact that no one witness can state in dollars and cents the exact amount of damage that has resulted to the next of kin, does not preclude recovery. Proof of character, habits, and other relevant matters, goes to the jury, and

Missouri, whether the plaintiff has or not suffered pecuniary loss or damage is immaterial. His right to recover depends solely on the plaintiff's relation to the deceased and the culpability of the defendant, within the meaning of the statute and as covered in the declaration. From this it follows that a plaintiff who has suffered no damage, but has even been relieved by the death of a pecuniary burden, may recover $5,000. If, in any case, any part of the amount recovered may be deemed compensatory, this is merely incidental, the primary object of the statute being punitory. No more and no less is recoverable, and this even though the plaintiff has suffered no damage.''—Raisor v. Chicago & A. R. Co., (1905) 215 Ill. 47, 74 N. E. 69, 106 Am. St. Rep. 153, 2 Ann. Cas. 802, adopting the language of the Appellate Court in deciding same case, 117 Ill. App. 488, citing Rafferty v. Missouri Pacific R. Co., (1884) 15 Mo. App. 559.

20—Davis v. Guarnieri, (1887) 45 O. St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.

21—Pittsburg, etc., R. Co. v. Thompson, (1870) 56 Ill. 138; Althorf v. Wolfe, (1860) 22 N. Y. 355; Harding v. Townsend, (1871) 43 Vt. 536.

22—Illinois Central R. Co. v. Baches, (1870) 55 Ill. 379.

the damages, usually being very difficult of measurement, are left very largely to the judgment of the jury.[23]

253. **Exemplary Damages** are given only if authorized by the statute giving an action for wrongful death, according to the weight of authority.[24]

254. **Abatement of the Action Through Death of the Sole Beneficiary.**—Where the sole beneficiary under a wrongful death statute dies before judgment, the action abates, unless there is provision otherwise in the statute. "The action being a totally new one, the creation of the statute, the procedure prescribed by the statute must be strictly followed, and it is only those named in the statute as persons entitled to bring the action who can bring it."[25]

CASE ILLUSTRATIONS

1. It appears that defendant, a physician, negligently treated plaintiff's intestate, so that he suffered greatly and died five days after the beginning of the treatment. In an action under a statute providing only a survival of the action of deceased, only

23—Fowler v. Chicago, etc., Ry. Co., (1908) 234 Ill. 619, 85 N. E. 298.

24—Swift v. Johnson, (1905) 138 Fed. 867, 71 C. C. A. 619; Burk v. Arcata, etc., R. Co., (1899) 125 Cal. 364, 57 Pac. 1065, 73 Am. St. Rep. 52; Moffatt v. Tenney, (1892) 17 Colo. 189, 30 Pac. 348; Conant v. Griffin, (1868) 48 Ill. 410; Atchison, T. & S. F. Ry. Co. v. Townsend, (1905) 71 Kan. 524; 81 Pac. 205, 6 Ann. Cas. 191; Garrick v. Florida Central, etc., R. Co., (1898) 53 S. Car. 448, 31 S. E. 334, 69 Am. St. Rep. 874; Smith v. Chicago, etc., R. Co., (1895) 6 S. Dak. 583, 62 N. W. 967, 28 L. R. A. 573.

The Virginia view that, under a statute permitting the jury to assess such damages as it may deem fair and just, exemplary damages may be assessed, seems a distortion of the meaning of the words of the statute, and is not usually followed. See Matthews v. Warner, (1877) 29 Gratt. (Va.) 570, 26 Am. Rep. 396. Cf. Potter v. Chicago, etc., R. Co., (1867) 21 Wis. 372, 94 Am. Dec. 548.

See collection of citations, 6 Ann. Cas. 194 note.

25—McHugh v. Grand Trunk Ry. Co., (1901) 2 Ont. L. R. 600, 2 Can. Ry. Cas. 7.

such damages can be allowed as the deceased suffered in his lifetime. A verdict of $3,000 is excessive.[26]

2. In an action for fatal injuries occasioned to plaintiff's intestate by defendant's negligence, the court permitted the jury to consider intestate's mental and physical suffering, although he was unconscious from the time of the accident until his death. Held, error.[27]

3. E was fatally injured by a collision on defendant's road. Before his death, E released the defendant, in consideration of the payment to him of his hospital expenses and $5,200 in money. After E's death, his widow is not barred by E's release from maintaining action for his wrongful death. The statute here gave an entirely new right of action to the heirs or personal representatives, and did not provide for a mere survival of the right of action which had already accrued to deceased.[28]

4. Deceased, whose estate consisted of an income of nearly £4,000 a year, was killed by defendant's negligence. The estate, upon his death, went to the eldest son, subject to a jointure of £1,000 a year for life to the widow and £800 a year to the eight younger children. Held, that an action for the wrongful death could be maintained, although the total income was not diminished by the death. The cutting off of reasonable expectations of educational and other advantages for any one of the family constitutes a basis for damages.[29]

5. Plaintiff sues for the wrongful death of his wife. He is entitled to recover the pecuniary value of the wife's domestic services, minus the cost of her maintenance.[30]

6. B was killed through the negligence of defendant. In an action brought by his widow as administratrix, the following instruction was requested by defendant and was refused: "The

26—Ramsdell v. Grady, (1903) 97 Me. 319, 54 Atl. 763.

27—Kennedy v. Standard Sugar Refinery, (1878) 125 Mass. 90, 28 Am. Rep. 214, a mere surviving action. In an action under a survival statute, where plaintiff's intestate was found dead, with no proof of any suffering, it has been held that only nominal damages can be recovered. Mulchey v. Washburn Car-Wheel Co., (1887) 145 Mass. 281, 14 N. E. 106, 1 Am. St. Rep. 458.

28—Earley v. Pacific El. R. Co., (Calif. 1917) 167 Pac. 513.

29—Pym v. Great Northern Ry. Co., (1863) 4 B. & S. 396, 122 Eng. Repr. 508.

30—Gorton v. Harmon, (1908) 152 Mich. 473, 116 N. W. 443.

pecuniary circumstances of the plaintiff and her infant daughter, at the time of and since the death of said B, cannot increase or diminish the amount of damages which the plaintiff is entitled to recover in this suit, in case the jury find the issue for her, and if the jury so find, they are instructed, in the assessment of damages, to disregard all the testimony as to the pecuniary circumstances of said plaintiff and her infant daughter, at the time of and since the death of the said B." Held, error to refuse this instruction. "The feelings of the widow or next of kin, their wealth or poverty, or any other fact than the pecuniary injury, cannot be considered in assessing the damages."[31]

7. Plaintiff's intestate was killed by negligence of deceased, leaving plaintiff, his widow, and seven children, of whom all were of age. C. W., one of the sons, who lived with deceased, was so crippled by rheumatism that he was unable to work. Held, that it was error to admit evidence of the helplessness of C. W.[32]

8. Testator, when killed, had three children, all grown, and none dependent upon him for support. The principal basis of a claim is "that the death of deceased put an end to accumulations which he might have thereafter made and which might have come to the next of kin. * * * In determining the probability of accumulations by deceased if he had continued in life, no account should be taken of the income derivable from his investments. These have come in bulk to the children, who may, if they choose, accumulate such income. A deprivation of the probability of his accumulating therefrom is no pecuniary injury. * * * It is plain that in determining probable future accumulations attention should be restricted to such as would arise from the labor of deceased in his business."[33]

9. Plaintiffs, sons and daughters, bring action for the death of their mother. Defendant offered in evidence the will of deceased, in which she gave all her property to her four daughters. The will was admissible in evidence. "The damages must be actual, and for loss of a pecuniary nature. Nothing is given by

31—Illinois Central R. Co. v. Baches, (1870) 55 Ill. 379. The case further holds that a deformity of the left hand of plaintiff, existing from birth, cannot be considered in assessing damages.

32—Chicago, P. & St. L. R. Co. v. Woolridge, (1898) 174 Ill. 330, 51 N. E. 701.

33—Demarest v. Little, (1885) 47 N. J. Law 28.

way of solace. Under such a law, we cannot see how it can be maintained that one has been damaged by the death when he has received from the estate of the deceased property exceeding in value all the prospective benefits which would have accrued to him had the death not ensued."[34]

10. Plaintiff married again since the wrongful death of his wife through the negligence of the defendant. His second marriage cannot be considered in mitigation of damages.[35]

11. Through the negligence of the defendant, plaintiffs' son, who had reached his majority, was killed. He did not live with them, but occasionally visited them and made contributions to their support, to the amount of about £20 per year. Judgment for £120. But it was further held that there was no right of action for funeral or mourning expenses.[36]

12. Father brings action under federal employers' liability act, for death of his adult son, but proves no loss of reasonable expectation of pecuniary assistance or support. No recovery can be had.[37]

13. Intestate, son of plaintiff, was killed by the negligence of defendant. He was 39 years old, able-bodied, a brakeman earning $2.25 per day. He had no one but himself to support, had accumulated nothing, and died almost penniless. At the time of his death, he was not in line of promotion in his calling. He paid his mother, the plaintiff, not over $50 per year, and did chores for her when visiting at home about twice a year. Held, that a verdict for $3,500 should be reduced to $2,000.[38]

14. Plaintiff's intestate had only a feeble intellect and earned

34—San Antonio, etc., Ry. Co. v. Long, (1894) 87 Tex. 148, 27 S. W. 113, 24 L. R. A. 637, 47 Am. St. Rep. 87. Contra: Railroad Co. v. Barron, (1867) 5 Wall. 90, 18 L. ed. 591; Terry v. Jewett, (1879) 17 Hun (N. Y.) 395.

35—Chicago & E. I. R. Co. v. Driscoll, (1903) 207 Ill. 9, 69 N. E. 620.

36—Dalton v. Southeastern Ry. Co., (1858) 4 C. B. (N. S.) 296, 27 L. J. C. P. 227.

37—Carolina, etc., Ry. v. Shewalter, (1913) 128 Tenn. 363, 161 S. W. 1136, L. R. A. 1916 C 964.

38—Hutchins v. St. Paul, M. & M. Ry. Co., (1890) 44 Minn. 5, 46 N. W. 79, 16 Am. Neg. Cas. 294. See also Wiest v. Electric Traction Co., (1901) 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666, holding that, where deceased has never accumulated any property, the jury has no right to take into consideration the possibility that he might have accumulated property if he had not been killed.

only $1.40 a day. A verdict for $3,400 for his wrongful death is excessive, under a statute measuring the damages by pecuniary injuries to the widow or next of kin. This award of the sum in gross would enable the family to realize three-fourths of intestate's income, in perpetuity.[39]

15. Plaintiff was a light porter in a hospital. Deceased, his son, 21 years old, porter to a saddler at wages of 23s. per week, was killed through the negligence of the defendant. Plaintiff had usually carried up coals to the wards of the hospital, for which he was paid 3s. 6d. a week, but, in consequence of plaintiff's illness, the deceased had for some time carried up the coals for him. Held, that the action is maintainable, but that a verdict for £75 is excessive.[40]

16. Plaintiff's intestate was killed at the age of four years. A verdict for $5,000 is held excessive. This amount far exceeds any reasonable probability of pecuniary benefit from the continued life of the deceased. The liability of the father for support and education of the child during minority, and the amount the father would probably receive from the son's earnings during or after minority, must be considered.[41]

17. Defendant negligently maintained in a street an open reservoir, into which plaintiff's 4-year-old boy slipped and fell, so that he was drowned. Plaintiff may maintain his action, and a verdict for $800 damages is not excessive.[42]

39—Chicago & N. W. Ry. Co. v. Bayfield, (1877) 37 Mich. 205.

40—Franklin v. Southeastern Ry. Co., (1858) 3 H. & N. 211, 8 E. R. C. 419, 157 Eng. Repr. 448.

41—Graham v. Consolidated Traction Co., (1899) 64 N. J. Law 10, 44 Atl. 964.

42—Chicago v. Major, (1857) 18 Ill. 349, 68 Am. Dec. 553.

PART V

STATUTORY PROCEEDINGS FOR THE CONDEMNATION OF PROPERTY

CHAPTER LIV

Eminent Domain

255. **In General.**—Under provisions of federal and state constitutions, private property cannot be taken for public use without just compensation.[1]

The owner of land taken for public use by virtue of the right of eminent domain, has, as a general rule, a right to recover the market value of the premises actually taken, and, in addition, any damages which proximately result to the portion of the same tract not taken. Damages recoverable for injury to the portion not taken include both damage caused by the taking of the property acquired for public purposes and damage occasioned by reason of the use to which the part taken is put.[2]

256. **Value of Land Taken.**—In arriving at the value of land taken, the jury must not consider the price that the property would bring under special or extraordinary circumstances, but its fair cash value if sold in the market under ordinary circumstances.[3] In order to show the

1—U. S. Const., Amendments, Art. V.

2—South Buffalo Ry. Co. v. Kirkover, (1903) 176 N. Y. 301, 68 N. E. 366.

3—Brown v. Calumet River R. Co., (1888) 125 Ill. 600, 18 N. E. 283; Tedens v. Chicago Sanitary District, (1894) 149 Ill. 87, 36 N. E. 1033; Haslam v. Galena, etc., R. Co., (1872) 64 Ill. 353.

"What constitutes 'market value' is a question of law, and is the price which the owner, if desirous of selling, would under ordinary circumstances surrounding

market value, it is proper to show the price at which similar tracts in the same neighborhood are generally held for sale, and at which they are sometimes actually sold in the course of ordinary business. Market price is not to be shown by evidence of particular sales of similar tracts.[4] Although the special value of the land to the owner or to the taker may be considered as one of the elements tending to show what it would bring in the market, such special value is not always the market value; and only the market value can be allowed.[5] The land "is to be valued precisely as it would be appraised for sale upon execution, or by executor or guardian; and without any regard to the external causes that may have contributed to make up its present value. The jury are not required to consider how much, nor permitted to make any use of the fact that it may have increased in value by the proposal or construction of the work for which it is taken."[6] Not only the present uses of the land, but its present capabilities, must be considered; and so, where the fee is taken, consideration must be given to any mine under the surface, although it has never been worked, and for any water power taken, even though it has never been used. These are among the elements giving the property its market value.[7]

the sales of property have sold the property for, and what a person desirous of purchasing, but not compelled to purchase, would have paid for it."—Chicago v. Farwell, (Ill. 1919) 121 N. E. 795.

4—Friday v. Pennsylvania R. Co., (1903) 204 Pa. 405, 54 Atl. 339; Becker v. Philadelphia & R. T. R. Co., (1896) 177 Pa. 252, 35 Atl. 617, 35 L. R. A. 583.

5—San Diego Land, etc., Co. v. Neale, (1891) 88 Calif. 50, 25 Pac. 977, 11 L. R. A. 604.

6—Giesy v. Cincinnati, etc., R. Co., (1854) 4 O. St. 308; Moulton v. Newburyport Water Co., (1884) 137 Mass. 163; Sargent v. Town of Merrimac, (1907) 196 Mass. 171, 81 N. E. 970, 11 L. R. A. (N. S.) 996.

7—Haslam v. Galena, etc., R. Co., (1872) 64 Ill. 353. Where land is taken by a boom company for a boom, it is proper to consider as an element of value its adaptability to boom purposes. Mississippi, etc., Boom Co. v. Patterson, (1879) 98 U. S. 403, 25 L. ed. 206.

Houses and trade fixtures pass to the condemnor, and it must pay for them.[8]

The value of the land is to be taken as of the date of filing the location, and not as of the date when the land is entered upon and construction commenced.[9]

There is a conflict of authority on the question whether loss of profits or injury to business is a recoverable element of damage in eminent domain, with a majority of courts holding that it is not.[10]

257. **Difference Between the Taking of the Fee and the Taking of a Mere Easement.**—It is sometimes very important to know whether the condemnor is taking a title in fee simple or is taking a mere easement. Obviously, the compensation for an easement will often be much less than compensation for the fee. For instance, where a railroad seeks to acquire a mere easement over valuable oil or mineral lands, it is required to pay only the value of the easement, and not the value of the fee, which might be many times as much.[11] However, where the easement

8—Kansas City v. Morse, (1891) 105 Mo. 510, 16 S. W. 893; Finn v. Gas & Water Co., (1882) 99 Pa. St. 631.

9—Hampden Paint, etc., Co. v. Springfield, etc., R. Co., (1878) 124 Mass. 118.

10—Profits and business lost not recoverable: Jacksonville & S. E. Ry. Co. v. Walsh, (1883) 106 Ill. 253; Whitman v. Boston, etc., R. Co., (1861) 3 Allen (Mass.) 133; Troy & Boston R. Co. v. Northern Turnpike Co., (1852) 16 Barb. (N. Y.) 100; Cox v. Philadelphia, etc., R. Co., (1906) 215 Pa. 506, 64 Atl. 729, 114 Am. St. Rep. 979. Damages recoverable for injury to business: Missouri, K. & T. R. Co. v. Haines, (1872) 10 Kan. 439 ("incidental loss"); Grand Rapids, etc., R. Co. v. Weiden, (1888) 70 Mich. 390, 38 N. W. 294. See article by Roland R. Foulke, "Consequential Damages in Eminent Domain," 65 Univ. of Pa. Law Rev. 51-66, 145-169, 258-281.

11—Northern Pacific & M. Ry. Co. v. Forbis, (1895) 15 Mont. 459, 39 Pac. 571, 48 Am. St. Rep. 692; Blake v. Rich, (1856) 34 N. H. 282; Penn Gas Coal Co. v. Versailles Fuel Gas Co., (1890) 131 Pa. 522, 19 Atl. 933.

"Under the condemnation the railroad company acquires the permanent and exclusive control of the surface of the land, but it acquires nothing more. It acquires no title to the minerals beneath the surface, and of course no right to dig beneath the surface for the pur-

taken destroys the whole value of the fee, the measure of damages is the value of the fee.[12]

258. **Injuries to Rest of Tract.**—The owner may get damages for such injuries to the rest of the same tract as are proximate and certain. This much is well settled.[13] The difficult question is, "What is a tract?" The test most frequently applied is that of unity of use.[14] If land used together is separated merely by a line, a highway, a railway, or a canal, it is nevertheless considered as one tract.[15] Where contiguous or practically contiguous pieces of land are farmed as one farm, they are considered as one tract; and so the amount of damage to the whole farm is considered. But two entirely separate pieces of land, owned by the same owner, are not one tract.[16]

pose of appropriating them, and if it should undertake to do so, could be restrained at the instance of the owner of the underlying fee. While the title to the minerals underneath the right of way is reserved exclusively to the owner of the land across which it is condemned, there is no doubt that by being restricted from entering upon it, it may be difficult and expensive for him to take them out; far more so than if he could operate directly over the land which has been appropriated under the easement; and it may be that much valuable mineral would have to be left to afford surface-support, or if this were taken out, a substituted surface-support would have to be provided by the owner. But evidence of all these matters would be submitted to the court and jury, and would enter as substantial factors in determining the value of the easement."—Southern Pacific R. Co. v. San Francisco Savings Union, (1905) 146 Calif. 290, 79 Pac. 961, 2 Ann. Cas. 962, 70 L. R. A. 221, 106 Am. St. Rep. 36.

12—Hollingsworth v. Des Moines, etc., R. Co., (1884) 63 Ia. 443, 19 N. W. 325; Robbins v. St. Paul, etc., R. Co., (1875) 22 Minn. 286.

13—Alabama Power Co. v. Keystone Lime Co., (1914) 191 Ala. 58, 67 So. 833, Ann. Cas. 1917 C 878; Young v. Harrison, (1855) 17 Ga. 30. See also 10 R. C. L. 153, and cases there cited.

14—Keithsburg, etc., R. Co., v. Henry, (1875) 79 Ill. 290; Ham v. Wisconsin, etc., Ry. Co., (1883) 61 Ia. 716, 17 N. W. 157.

15—West Skokie Drainage District v. Dawson, (1909) 243 Ill. 175, 90 N. E. 377, 17 Ann. Cas. 776; Rudolph v. Pennsylvania, etc., R. Co., (1898) 186 Pa. 541, 40 Atl. 1083, 47 L. R. A. 782.

16—Kennebec Water District v. Waterville, (1902) 97 Me. 185, 54

An intention of the taker of the land to repair damages does not mitigate. To hold otherwise would be unsafe.[17]

259. **One Recovery.**—Where part of a tract is permanently taken and the rest is injured, the owner may recover his compensation, once for all, just as if there were no element but the taking. "In all cases where property, whether it be lands or water-rights, has been permanently appropriated by the company to its use, the damages sustained are a unit, and are recoverable as such, and not by piecemeal."[18]

260. **Remote, Speculative, or Contingent Damages** cannot be recovered any more easily in this field than in any other. The rules of proximity and certainty govern, as usual.[19]

Where the owner of the property taken has a stock of goods on the premises, he has a right to be compensated for the diminution in their value by reason of the necessity of immediately tearing them out and installing them elsewhere; but he is not entitled to reimbursement for the expense of removing his stock of goods from its old location to a new location.[20]

261. **Benefits.**—Sometimes the part of the tract not taken really receives benefits as well as damage by reason of the taking of the other part for public purposes. Different views are taken as to the setting off of such benefits against damages. The constitutional and statutory provisions and the judicial interpretations of them,

Atl. 6, 60 L. R. A. 856; Cameron v. Chicago, M. & St. P. Ry. Co., (1889) 42 Minn. 75, 43 N. W. 785.

17—Colorado M. Ry. Co. v. Brown, (1890) 15 Colo. 193, 25 Pac. 87.

18—Lehigh Valley R. Co. v. McFarlan, (1881) 43 N. J. Law 605.

19—See Old Colony, etc., R. Co. v. County of Plymouth, (1859) 14 Gray (Mass.) 155.

20—St. Louis v. St. Louis, I. M. & S. Ry. Co., (1916) 266 Mo. 694, 182 S. W. 750, Ann. Cas. 1918 B 881.

vary so greatly that only a few general principles stand out with any prominence from the mass of conflicting statements of principles.

Where benefits are allowed to be set off against the damages, the weight of authority is as follows: "The benefits to be considered and allowed by the jury, where only a part of an entire tract is taken, are not such as are common to lands generally in the vicinity, but such as result directly and peculiarly to the particular tract in question; as, for instance, where property is made more available and valuable by opening a street through it, or when land is drained or otherwise directly improved. So * * * if any part of the meadow not taken, bordering on the overflowed land, is benefited, or if the property is directly made more available for practical and advantageous use and enjoyment by the improvement. * * * But remote or speculative benefits, in anticipation of a rise in property for townsite purposes, or, generally, by reason of the proposed improvement of a water power and the erection of mills in the vicinity, cannot be considered."[21]

CASE ILLUSTRATIONS

1. A city instituted proceedings to condemn land for the opening of a street through A's agricultural land, which was so situated as to be available for platting into city lots. "The court told the jury that speculative damages were not to be allowed, and in determining the value of the land they should not take into consideration what it might be worth at some remote and future time, when it might be used for some other purpose; that in determining the value of the land taken they were to be governed by the fair market value at the time it was taken, for any purpose for which it might reasonably be used in the immediate future; that if the present value was enhanced, by reason of its

21—Whitely v. Mississippi Water Power Co., (1888) 38 Minn. 523, 38 N. W. 753. Accord: Meacham v. Fitchburg R. Co., (1849) 4 Cush. (Mass.) 291.

adaptability to some use to which it might be put in the near future, was so situated that it might be platted into city lots, and that its present value was thereby increased, such increase was a proper ground of assessment of damages'; that 'the actual use to which it is put must also be considered with the surrounding circumstances; that you are not to include remote or speculative values, but only the value of the land when taken, with reference to its availability for any purpose to which it might reasonably be put'; that they should 'not take into consideration what it might be worth at some remote and future time, when it might be put on the market as lots, but you may consider its present value for such purposes.'" This is a correct instruction.[22]

2. A railroad company takes part of A's lots, cutting off the rest from tidewater. The damage accruing to these adjoining lots not taken, is a proper element to be considered by the jury.[23]

3. A railroad is run through an 80-acre field, which is part of a 240-acre farm. Held, that the farm is the tract damaged by the taking, and that damages must be assessed for the injury to the whole farm, as it was connected and used together.[24]

4. A county laid out a public highway across a railroad company's tracks. The owners of the railroad "are entitled to recover damages for taking their land for the purposes of a highway, subject, however, to its use as a railroad; for the expense of erecting and maintaining signs required by law at the crossing; for making and maintaining cattle guards at the crossing, if necessary; and for the expense of flooring the crossing, and keeping the planks in repair." No damages can be allowed for increased liability to damage from accident from collision and otherwise, by reason of the laying out of the highway at grade over their track, or for increased expense for ringing a bell as required by law, or for liability of being ordered by county commissioners to build a bridge for the highway over the railroad track.[25]

22—Alexian Bros. v. Oshkosh, (1897) 95 Wis. 221, 70 N. W. 162.

23—Drury v. Midland R. Co., (1879) 127 Mass. 571.

24—Keithsburg, etc., R. Co. v. Henry, (1875) 79 Ill. 290.

25—Old Colony, etc., R. Co. v. County of Plymouth, (1859) 14 Gray (Mass.) 155.

5. The railroad of the C Co., which takes a right of way across P's land, crosses the A Co's railroad at a corner of P's tract, the crossing making the tract more valuable than ever. Below, P was compensated only for the land actually taken, no damages being given for injury to the rest of the tract. Affirmed. Special benefits may be set off against damage to remaining part.[26]

26—Page v. Chicago, M. & St. P. Ry. Co., (1873) 70 Ill. 324.

PART VI

MODERN LEGISLATION RELATING TO WORKERS INJURED IN INDUSTRIES

CHAPTER LV

Employers' Liability and Workmen's Compensation.

262. **Difference Between Employers' Liability and Workmen's Compensation.**—Employers' liability and workmen's compensation are so often popularly confused with each other that it seems necessary to begin our study with a statement of the difference between the two terms. Employers' liability legislation modifies the common law basis of liability of an employer for injuries suffered by his employee or substitutes for it a new basis of liability. Such legislation may undertake to change the rules of liability as between all employers and their employees, or it may aim only at such employers as do not elect to place themselves under the operation of a state plan, laid out in the same statute or in another statute, under which plan some form of workmen's compensation is provided for the employees of such employers as accept it.[1]

Employers' liability legislation merely changes the rules for determining the rights of private individual against private individual. The obvious purpose of such legislation is to impose certain rules of conduct and therefore certain duties upon the employer and to give the employee rights commensurate with such duties.

The purpose of workmen's compensation is, not so much to give a private right, but rather so to organize

1—E. g., see: N. J. Laws 1911, Chap. 95, Sec. II, § 7, Labatt's Master and Servant, p. 5594; Illinois Act of 1911, Sec. 1, Labatt's Master and Servant, p. 5533.

industrial society that injuries to employees, even when not caused by any breach of duty on the part of the employer, shall not be borne by the employee alone, but partly, at least, by the industry.[2]

263. **Employers' Liability Legislation.**—Under the common law, according to the interpretation that had come to be well fastened upon it a half century ago, it was probably impossible for a majority of employees to recover damages for injuries inflicted upon them, either

2—"The body of law involved in the law of torts and employers' liability statutes pertains entirely to the redress of private wrongs. In such instance, liability results in the payment of damages to the employee intended to be commensurate with, and to reimburse him for, the injury suffered. Such law has for its sole object and end the regulating of private rights. * * * The obligations, on the other hand, of industrial insurance and workmen's compensation accrue from contingencies not dependent upon or within the control of the parties, and thus have no relation whatever to the conduct of the parties; hence these obligations are not based on wrongs. It follows, then, that they must pertain to the subject of government regulations, and are in the nature of economic provisions, taking the form of indirect taxation levied to regulate occupations, for on what other basis would the government be justified in writing into the labor contract, against the will of the parties, an insurance policy? Were this not so, industrial insurance or workmen's compensation would be, from the standpoint of both the employee and the employer, without basis of justice or equity; for the theory of such laws is that compensation is not to be commensurate with injury, but is to be based upon wages, thus substituting for the former obligations based upon tort, which offered damages commensurate with injury, a purely arbitrary sum. Such a scheme can have no relation to the adjustment of private wrongs. If it be justifiable, it must be on the sociological theory of the right of the State to levy a tax for the purpose of protecting, from an economic standpoint, the community as a whole."—Robert J. Cary's Brief on the Power of Congress in Respect of Industrial Insurance, p. 51, quoted by Smith, J., in Cunningham v. North Western Improvement Co., (1911) 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720.

"Liability under the compensation acts is based on contract, and the right to compensation arises ex contractu. In theory, it is a form of industrial insurance, the burden of industrial accidents being placed upon the industry rather than upon the workman."—Suth. Dam. 4th ed. § 1303.

negligently or otherwise, in the course of their employment. This deficiency of the law was a fruitful source of poverty and distress. The doctrines of fellow-servant, assumed risk, and contributory negligence effectually barred a large number of actions by employees. Employers' liability statutes have, in varying degree, modified or abolished these defenses. Some of the statutes have greatly reduced the number of cases to which the fellow-servant rule is applicable, by extending the doctrine of vice-principal so as to make the acts of many of the more important employees the acts of the principal; while other statutes have entirely abolished the fellow-servant rule. The doctrine of assumed risk has also been modified and restricted in its operation. Contributory negligence has been greatly lessened in importance as a defense by these statutes, of which some go so far as to abolish it as a defense in a suit by an employee against his employer.[3] Another reform introduced by these statutes is the holding of the employer to a much higher degree of care than that required by the common law. Certain safety devices are required by some of the statutes.

264. **Federal Employers' Liability Statute as to Common Carriers.**—The federal statute providing for liability of interstate common carriers to their employees for injuries, provides as follows: "Every common carrier by railroad, etc., shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or

3—American Employers' Liability Acts are modeled after the English Employers' Liability Act of 1880. For the text of a number of such acts, see Labatt's Master and Servant, § 1656 et seq.

in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."[4]

As to measure of damages in cases of injuries to employees of interstate carriers, the federal statute supersedes all state statutes.[5]

265. **Negligence.**—Federal and state employers' liability acts place upon employers larger duties of care for the safety of their employees than were imposed upon them by the common law. As the duty of care is enlarged, and negligence is a failure to conform to one's duty, the field of negligence is broadened by liability acts. Under employers' liability acts, liability is based upon the negligence of the employer.[6]

266. **Contributory Negligence Under Federal Statute.**—Where the employee has been guilty of negligence contributing to his injury, such contributory negligence does not defeat his recovery under the Federal Employers' Liability Law already alluded to, but merely diminishes

4—U. S. Comp. Stat. 1916, § 8657. Notice the difference between this and some state statutes. See Horton v. Seaboard Air Line Ry. Co., (N. Car. 1918) 95 S. E. 883, 16 N. C. C. A. 724 (729). Here it is seen that, under some state statutes, "the damages are based upon the present worth of the net pecuniary value of the life of the deceased." Under the federal statute, the damages are based upon the pecuniary loss sustained by relatives of certain classes, who would have been benefited by the continuance of the life of the deceased, so that recovery can be had only of compensation to the specified classes of relatives. No recovery can be had if relatives of such classes do not exist. In a suit brought under the federal statute, the jury must find separately, "as to each plaintiff, what pecuniary benefit each plaintiff had reason to expect from the continued life of the deceased."

5—Chicago, R. I. & P. Ry. Co. v. Devine, (1915) 239 U. S. 52, 60 L. ed. 140, 36 Sup. Ct. 27.

6—Seaboard Air Line Ry. v. Horton, (1914) 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834.

his damages in proportion to the amount of his negligence.[7]

Where, however, the employee's negligence is the sole cause of the injury, there can be no recovery under the act. But it must be noticed, in this connection, that the statute provides for a recovery for an injury or death resulting *in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier.[8]

267. **Distinction Between Contributory Negligence and Assumption of Risk.**—At common law, either the contributory negligence of the plaintiff or the assumption of risk by him defeated his right to recover, so that it was to little purpose to speculate upon fine distinctions between the two. But, under the Federal Employers' Liability Act, it becomes highly necessary to distinguish between them; for the act takes away the defense of contributory negligence, while recognizing that of assumed risk, except in cases wherein a federal statute for the promotion of the safety of employees is violated by the employer.[9]

Contributory negligence is a neglect or breach of duty by the employee in regard to his own self-preservation or personal safety. Assumption of risk is not grounded in negligence of the employee, contributory or otherwise. The employee is considered as having assumed all such risks as one may reasonably suppose to be within the contemplation of the employee as incident to the kind of work in which he engages.[10]

7—Act of April 22, 1908, Section 3; 35 U. S. Stat. L. 65, c. 149; U. S. Ann. Stat. § 8659; Kippenbrock v. Wabash R. Co., (1917) 270 Mo. 479, 194 S. W. 50, 16 N. C. C. A. 790.

8—Federal Employers' Liability Act, U. S. Ann. Stat. 1916, §§ 8657-8665; Suth. Dam. 4th ed. § 1326, citing Fletcher v. South Dakota Central Ry. Co., (S. Dak. 1915) 155 N. W. 3, and other cases. See notes, 3 N. C. C. A. 806, and 3 N. C. C. A. 812.

9—Suth. Dam. 4th ed. § 1325.

10—Suth. Dam. 4th ed. § 1325, citing Seaboard Air Line Ry. v. Horton, (1914) 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834.

268. **Elements of Damages for Personal Injuries.**—Under employers' liability acts, as at common law, the plaintiff employee can recover for diminution of earning power, physical pain, mental suffering, and nervous shock. As at common law, only those elements of future damage are recoverable which may be proved with reasonable certainty. Elements that are uncertain, speculative, or remote, are of course not recoverable.[11]

269. **Measure of Damages for Death.**—Employers' liability acts in providing an action in favor of certain dependents, in the event of the employee's death by reason of injuries inflicted by the negligence of the employer, aim at the assessment of such an amount of damages as will compensate the dependent for the pecuniary loss occasioned by the death of the employee. Here, as in the case of a permanent diminution of earning power at common law, it must be borne in mind that the amounts which the deceased, had he lived, would have earned and paid to the dependent, would have been paid periodically, and not in a lump, while the damages are paid in one lump practically immediately. For this reason, the total sum of the amounts that the deceased would have contributed to the support of the dependent, do not constitute the measure of damages. Only the present worth of such sums, minus the probable personal expenses of the deceased, can properly be assessed as damages.[12]

These acts provide damages for pecuniary loss only, allowing nothing as a balm for the feelings. They compensate for loss of maintenance and support, but not for "care" or "advice" of a deceased husband, where such "care" and "advice" is not shown by the pleading and proof to be of pecuniary value.[13]

11—Suth. Dam. 4th ed. § 1331, and cases there cited.

12—Kansas City Southern R. Co. v. Leslie, (1914) 112 Ark. 607, 167 S. W. 83. See 6 N. C. C. A. 447 note.

13—Michigan Central R. Co. v. Vreeland, (1913) 227 U. S. 59, 57

270. **Proximate Cause.**—The mere fact that the employer has violated some safety provision of an employers' liability act, does not render him liable in damages for any injury that his employee may suffer, whether there be a proximity of causal connection between the violation and the injury, or not. The statutory negligence of the employer must be the proximate cause of the injury to the employee, or there is no cause of action.[14]

The plaintiff cannot recover for remote or speculative elements of damage.[15]

271. **Workmen's Compensation** is a kind of industrial insurance, prescribed by statute and varying in different states as to the amounts to be paid for different injuries under different circumstances. The compensation is generally made large or small, according to the nature of the injury and the amount of the wages being received by the employee injured. Workmen's compensation is largely a definite, cut-and-dried matter, having as one of its chief aims the prevention of litigation and the substitution of certainty of amount of compensation for the age-long uncertainty as to the amount of damages an injured employee will receive in an action at common law. The compensation is commonly awarded by a mere administrative board, with the avowed purpose of preventing large expenditures for lawyers' fees and court costs. The operation of the law is usually supposed to be "automatic," and generally it is about as automatic in its workings as is an accident insurance policy. The statute commonly states a percentage of the wages for a certain time, to be paid in the event of a certain kind of injury.[16]

L. ed. 417, 33 Sup. Ct. 192; New York Central R. Co. v. Winfield, (1917) 244 U. S. 147, 61 L. ed. 1045, 37 Sup. Ct. 546.

This construction follows that placed upon Lord Campbell's Act and similar statutes.

14—St. Louis, I. M. & S. Ry. Co. v. McWhirter, (1913) 229 U. S. 265, 57 L. ed. 1179, 33 Sup. Ct. 858.

15—Chicago, M. & St. P. R. Co. v. Lindeman, (1906) 143 Fed. 946, 75 C. C. A. 18.

16—Strictly speaking, compensa-

272. **The Basis of the Right to Workmen's Compensation.**—The right of a workman to compensation, being independent of any question of tortious wrong by the em-

tion allowed a workman under a workmen's compensation act, is not "damages" at all, as the amount of compensation depends merely upon certain more or less arbitrary criteria, while the amount of damages depends, in general, upon the amount of damage done. "The term 'damages' means the recovery allowed in an action at law as contrasted with compensation under this act."—California Workmen's Compensation Act of 1917, California Stat. 1917, Chap. 586, Sec. 3, § 5.

The following extracts from the New Jersey statute serve to illustrate: "Following is the schedule of compensation: (a) Schedule of payments. Temporary disability. Proviso. For injury producing temporary disability, 50 per centum of the wages received at the time of injury, subject to a maximum compensation of $10 per week and a minimum of $5 per week; Provided, that, if at the time of injury the employee receives wages of less than $5 per week, then he shall receive the full amount of such wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks. (b) Complete disability. Proviso. For disability total in character and permanent in quality, 50 per centum of the wages received at the time of injury, subject to a maximum compensation of $10 per week and a minimum of $5 per week; Provided, that if at the time of injury the employee receives wages of less than $5 per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks. (c) Partial disability. For disability partial in character but permanent in quality, the compensation shall be based upon the extent of such disability. In cases included by the following schedule the compensation shall be that named in the schedule, to wit:

Thumb. For the loss of a thumb, 50 per centum of daily wages during sixty weeks.

First finger. For the loss of a first finger, commonly called index finger, 50 per centum of daily wages during thirty-five weeks.

. . . . . .

Hand. For the loss of a hand, 50 per centum of daily wages during one hundred and fifty weeks.

Basis of computation in case of death. In case of death compensation shall be computed but not distributed on the following basis:

(1) Actual dependents.

If orphan or orphans, a minimum of 25 per centum of wages of deceased, with 10 per centum additional for each orphan in excess of two, with a maximum of 50 per centum.

If widow alone, 25 per centum of wages.

If widow and one child, 40 per centum of wages. * * *

Distribution of compensation in case of death. Compensation in case of death shall be computed on

ployer, rests upon a contractual relation between employer and employee.[17] Any employer who employs labor under the operation of a workmen's compensation act impliedly agrees to insure his employees against injuries, in such amounts as are prescribed by the statute.

273. **Negligence of Employer of No Effect in Determining Whether Employee Be Compensated.**—The right of the employee to compensation, under acts providing for workmen's compensation, does not depend upon the negligence of the employer; nor, under the usual provisions of the statute, does contributory negligence not amounting to wilful misconduct bar the right of the employee to recover compensation.[18]

274. **Scope of Employment—What Acts Are Within the Employment and What Injuries Are Held to Have Resulted from it—"Accident."** [19]—Compensation is com-

the basis of the foregoing schedule, but shall be distributed according to the laws of this state providing for the distribution of the personal property of an intestate decedent, unless decedent has in fact left a will.

(2) No dependents.

Sickness and burial. Expense of last sickness and burial not exceeding $200.

17—Dettloff v. Hammond, etc., Co., (Mich. 1917) 161 N. W. 950, 14 N. C. C. A. 901.

18—Archibald v. Ott, (1916) 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916 D 1013.

19—On the subject in general, see: Nisbet v. Rayne & Burn, [1910] 2 K. B. 689, 3 N. C. C. A. 268; Dietzen Co. v. Industrial Board, (1917) 279 Ill. 11, 116 N. E. 684, 14 N. C. C. A. 125; Ohio, etc., Vault Co. v. Industrial Board, (1917) 277 Ill. 96, 115 N. E. 149, 14 N. C. C. A. 224; In re McNicol, (1913) 215 Mass. 497, 102 N. E. 697, 4 N. C. C. A. 522; Pigeon v. Employers' Liability Assurance Corp., Ltd., (1913) 216 Mass. 51, 102 N. E. 932, 4 N. C. C. A. 516; Milliken v. A. Towle & Co., (1914) 216 Mass. 293, 103 N. E. 898, 4 N. C. C. A. 512. See also important note on "Time, Place or Particular Manner of Injury or Death as Affecting Question whether Accident arose out of and in Course of Employment," 16 N. C. C. A. 879.

"The basis of recovery under the Workmen's Compensation Act is that the injury be proximately caused by the accident and is not intentionally self-inflicted."—Frint Motorcar Co. v. Industrial Commission, (Wis. 1919) 170 N. W. 284.

monly provided only for injuries resulting from accidents arising "out of and in the course of the employment." The purpose of such provision is that compensation shall be given to the employee only for injuries resulting from risks reasonably incident to the employment. If an injury occurs while an employee is doing what a man in such employment may reasonably do during the time in which he is employed, and at a place where he may reasonably be at such time, he has a right to compensation.[20]

Every employee must of necessity do, in the course of his employment, many acts which do not relate directly to his work. Among such acts are all those things done which are strictly personal to himself, ministering to the sustenance of his life and to his necessary comfort during the hours of work.[21]

In England, compensation is refused where the injury has resulted from a sportive act of a fellow worker;[22]

20—Fitzgerald v. Clarke & Son, [1908] 2 K. B. 796, 77 L. J. K. B. 1018.

21—"A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of the work. * * * That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment."—Archibald v. Ott, (1916) 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916 D 1013, citing: Vennen v. New Dells Lumber Co., (1915) 161 Wis. 370, 154 N. W. 640, L. R. A. 1916 A 273; Zabriskie v. Erie R. Co., (1913) 85 N. J. L. 157, 88 Atl. 824, 4 N. C. C. A. 778.

See comprehensive note, "Injury to Employee during Performance of Act for Own Purpose or Convenience as Resulting from Accident Arising out of and in Course of Employment," 12 N C. C. A. 891. For a long list of various acts which have been held to be in the "course of employment," see Griffith v. Cole Bros., (Ia. 1917) 165 N. W. 577, 15 N. C. C. A. 674 and note.

"The test seems to be whether deceased 'though actually through with the work, was still within the sphere of the work,' was doing what 'a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.'"—7 N. C. C. A. 409 note.

22—Fitzgerald v. Clarke & Son, [1908] 2 K. B. 796, 1 B. W. C. 197,

but, in the United States, compensation has sometimes been allowed in such cases, the injury being treated as having arisen out of and in the course of the employment.[23] Sportive acts among employees are so common that it would seem that such acts may well be held to be within the contemplation of the parties to a contract of employment and within the intention of the legislature in enacting a workmen's compensation law. As has been said before, compensation is not a matter of liability for negligence or for wilful wrong; it is rather a matter of making the industry, instead of the worker, pay for injuries arising from risks incident to the industry. It is submitted that the American view is the better.

The infliction of injuries upon an employee by means of nervous shock has been held to give a right of compensation. Where a fatal accident occurred to one employee, and a fellow workman under the same employer went to his rescue, thereby sustaining a serious nervous shock, so that he was no longer able to work, the fellow workman who had sustained only a nervous shock was held entitled to compensation.[24] But this is not so where the nervousness is such as can be overcome by a genuine effort to work. Malingering gives no workman a right to compensation.[25]

Occupational diseases are not compensated for, unless expressly mentioned in the statute.[26]

"Accident," as used in compensation acts, has a broad meaning, such as is popularly given the word; that is, it is used in the common, everyday, colloquial sense and not strictly.[27] An accident, in this sense, is merely "an un-

99 L. T. Rep. 101, 77 L. J. K. B. 1018; Suth. Dam. 4th ed. § 1380, and cases there cited.

23—Hulley v. Moosbrugger, (1915) 87 N. J. L. 103, 93 Atl. 79, 8 N. C. C. A. 283, and N. C. C. A. note.

24—Yates v. South Kirkby, etc., Collieries, [1910] 2 K. B. 538, 3 N. C. C. A. 225.

25—See 3 N. C. C. A. 229, note.

26—Suth. Dam. 4th ed. § 1378; Miller v. American Steel & Wire Co., (1916) 90 Conn. 349, 97 Atl. 345.

27—Fenton v. Thornley & Co.,

looked-for mishap or untoward event which is not expected or designed."[28]

The question whether an "accident" is the cause of an injury is a mixed question of law and of fact;[29] but, when the facts are ascertained, it is a question of law.[30]

275. **Referring Disability to Original Injury.**—A disability occasioned by a second injury can be referred to the first, if it can properly be considered a proximate result of the first injury.[31]

276. **Amount of Compensation.**—In arriving at the amount of compensation, one must consider: first, the amount being earned by the employee at the time of the injury; second, the nature and extent of the injury; third, the extent of the resulting incapacity.[32] Even though the *quantum* of the compensation is affected by the amount of wages, the payment is not instead of wages, but is in place of all the rights of action that belonged to the injured employee, and covers suffering and temporary or permanent disability as well as loss of wages.[33]

[1903] App. Cas. 443, 19 T. L. R. 684.

28—Bryant v. Fissell, (1913) 84 N. J. Law 72, 86 Atl. 458, 3 N. C. C. A. 585. See also Clover, Clayton & Co. v. Hughes, [1910] App. Cas. 242, 26 T. L. R. 359.

29—Roper v. Greenwood, [1900] 83 L. T. 471.

30—Fenton v. Thornley & Co., [1903] App. Cas. 443, 19 T. L. R. 684.

31—See 16 N. C. C. A. 550 note, and cases there cited, which include: Shell Co. v. Industrial Acc. Commission, (Calif. App. 1918) 172 Pac. 611; Pacific Coast Casualty Co. v. Pillsbury, (1915) 171 Calif. 319, 153 Pac. 24; Reiss v. Northway Motor, etc., Co., (1918) 201 Mich. 90, 166 N. W. 840.

32—Suth. Dam. (4th ed.) § 1387.

E. g., see the following: Calif. Stat. 1917, Chap. 586, Sec. 9; Code of Iowa, Supp., § 2477 m 9; 3 Md. Ann. Code, Art. 101, Sec. 36; Okla. Sess. Laws 1915, Chap. 246, Sec. 6; Rem. & Bal. Ann. Code Wash., Supp. 1913, 6604-5.

33—King v. Viscoloid Co., (1914) 219 Mass. 420, 106 N. E. 988, 7 N. C. C. A. 254.

"The scheme of the act is that the employer shall be insured against the losses from personal injury to employees arising out of and in the course of their employment. The cost of such insurance

277. **Aggravation or Acceleration of Injury by Pre-Existing Condition.**—The fact that claimant's injury in course of employment was accelerated or aggravated by a pre-existing ailment, does not deprive him of his right to compensation.[34]

278. **"Total Disability."**—Where an act provides certain compensation for total disability, the fact that, because a workman already has some physical deficiency, so that he can be totally disabled by an injury which would only partially disable a normal man, does not deprive him of his right to compensation for total disability. If an employee has already lost one hand before his employment, and now loses the other, or if he has already lost one eye and now loses the other, he is held entitled to compensation as for total disability.[35]

279. **Disfigurement** can be allowed for under a workmen's compensation act, only if mentioned therein.[36]

can be determined so long as the basis on which compensation is to be reckoned is wages paid by the employer. * * * But it would be a matter of utter uncertainty if the compensation should depend, not upon wages paid, but upon wages which the Industrial Accident Board after an injury may find upon independent evidence, perhaps not readily open to the employer during the period of employment, that the injured employee might have earned in some other employment or field of activity. * * * 'Wages,' as here used, means 'the wages earned in the particular employment out of which the injury arose.' "—In re Gagnon, (Mass. 1917) 117 N. E. 321, 16 N. C. C. A. 286. The probability of an increase in the wages of an injured or killed minor employee has sometimes been taken into consideration in making an award. See 16 N. C. C. A. 286 note.

34—Hartz v. Hartford Faience Co., (1916) 90 Conn. 539, 97 Atl. 1020, 14 N. C. C. A. 543-545 note.

35—In re J. & P. Coats, (R. I. 1918) 103 Atl. 833, is a strong case in point. See also Industrial Commission v. Johnson, (Colo. 1918) 172 Pac. 422, 16 N. C. C. A. 350 and note.

36—See note on "Disfigurement as Ground for Compensation under Workmen's Compensation Acts," 16 N. C. C. A. 481.

Under the New York act, reading as follows: "In case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make

280. **Avoidable Consequences.**—Results proximately arising from negligence of the workman, following his original injury in the course of employment, and which are results clearly avoidable by the workman if he only act as a prudent man, are not proximate results of the original injury, and therefore cannot be compensated for. So, where an employee, after injury to his eye and the consequent formation of a cataract, is blind, but can be cured of his blindness by an operation, which would probably be successful and is attended by no risk, the proximate cause of his continued blindness is not the accident, but is his unreasonable refusal to permit the operation; and therefore he cannot recover compensation for permanent blindness.[37]

281. **Dependents.**—Where an employee dies of his injuries, only his dependents have a right to compensation. Dependency is a question of fact. Proof of the relation of wife or minor child to deceased ordinarily raises a presumption of dependency; but proof may be adduced also to show that others are dependent.[38]

282. **Choice of Remedy.**—Where the statute does not make the right of compensation, according to schedule, a substitute for other rights of action, the employee may waive his rights under the act and bring his tort action for damages.[39] So also, an employee may accept a lump

such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed three thousand five hundred dollars,'' it is held that ''concurrent awards may be made, one for serious facial or head disfigurement, and one for disability or loss of earning power.'' —Erickson v. Preuss, (1918) 223 N. Y. 365, 119 N. E. 555, 16 N. C. C. A. 481, aff'g 169 N. Y. Supp. 1093.

37—Joliet Motor Co. v. Industrial Board, (1917) 280 Ill. 148, 117 N. E. 423, 15 N. C. C. A. 75. Accord: Walsh v. Locke & Co., [1914] W. C. & Ins. Rep. 95, 6 N. C. C. A. 675.

38—Suth. Dam. (4th ed.) § 1385, and cases there cited.

39—State ex rel. Yaple v. Creamer, (1912) 85 O. St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694, 1 N. C. C. A. 30.

sum settlement, in the absence of statutory prohibition of such settlement, and thus bar his right to compensation under the act, even if disability develops later.[40]

283. **Compulsory and Elective Acts.**—Under some acts, all of certain enumerated employments are placed under the operation of a plan for compensation, whether employers and employees so desire or not. Under other acts, either an employer or an employee may elect to come under the compensation plan. Under still other and probably most acts, either employer or employee may, at a specified time, reject the operation of the act.[41]

284. **Exemplary Damages.**—It is not within the usual purpose of workmen's compensation acts to afford a basis for exemplary damages or any form of punishment. The Massachusetts compensation act, however, provides that "if the employee is injured by reason of the serious and willful misconduct of a subscriber or of any person reg-

40—In re McCarthy, (Mass. 1917) 115 N. E. 764, 14 N. C. C. A. 346.

41—Suth. Dam. (4th ed.) § 1375.

Either employer or employee may, by notice, elect to reject the operation of the act, under Code of Iowa, Supp. §§ 2477 m, 2477 m 2.

The New Jersey act provides that the employer may choose to avail himself of the act or not. If not, defenses of fellow-servant, assumed risk, and contributory negligence if not wilful, are abolished. See summary of New Jersey statute, 2 N. C. C. A. 839.

The Ohio statute compels employers of five or more workmen in the same business to elect between paying into a state insurance fund a certain premium and being liable without being allowed to avail themselves of the defenses of fellow-servant rule, assumption of risk, or contributory negligence. State ex rel. Yaple v. Creamer, (1912) 85 O. St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694, 1 N. C. C. A. 30.

The Washington statute requires employers in extra-hazardous employments to contribute to an insurance fund based upon their payrolls, and provides stated compensation. State ex rel, Davis-Smith Co. v. Clausen, (1911) 65 Wash. 156, 117 Pac. 1101.

The Wisconsin statute provides that an employer may elect to come under the compensation plan or not, but, if not, that the defenses of fellow-servant and assumed risk are abolished. Borgnis v. Falk Co., (1911) 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489, 2 N. C. C. A. 834.

ularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled."[42]

CASE ILLUSTRATIONS

1. A cashier was murdered and robbed while traveling in a railway carriage to a colliery with a large sum of money for the payment of his employers' workmen. This is an "accident" from the standpoint of the person murdered and arises "out of" his employment, and, therefore, his widow is entitled to receive compensation under the Workmen's Compensation Act of 1906.[43]

2. A workman engaged in coal mining sustained a nervous shock, caused by excitement and alarm resulting from a fatal accident to a fellow workman engaged in the same employment. This is a "personal injury by accident arising out of and in the course of the employment," within the Workmen's Compensation Act of 1906.[44]

3. Decedent was killed by a heavy bar of metal falling upon his head from an upper story of the building upon which he was at work. The falling of the bar was caused by another workman, but it did not appear that his act was intentional. Held, an "accident" within the purview of the statute.[45]

4. Petitioner, after ten days' service in defendants' bleachery, was affected with a rash, which was pronounced to be a condition of eczema, and it was said that it might be caused by acids. The trial judge found that petitioner's condition was caused by contact with the dampened goods. Held, that the petitioner was not injured by accident.[46]

5. An employer supplied contaminated drinking water to his employe, who thereby contracted typhoid fever and died. Held, that this was a personal injury accidentally sustained, proxi-

42—Mass. Laws of 1911, Chap. 751, part II, section 3; 1 N. C. C. A. 560.

43—Nisbet v. Rayne & Burn, [1910] 2 K. B. 689, 3 N. C. C. A. 268.

44—Yates v. South Kirkby, F. & H. Collieries, Ltd., [1910] 2 K. B. 538, 3 N. C. C. A. 225.

45—Bryant v. Fissell, (1913) 84 N. J. Law 72, 86 Atl. 458, 3 N. C. C. A. 585.

46—Liondale Bleach, Dye & Paint Works v. Riker, (1914) 85 N. J. Law 426, 89 Atl. 929, 4 N. C. C. A. 713.

mately caused by accident while the employe was performing services growing out of and incidental to his employment.[47]

6. A, traveling salesman for B, is killed in the sinking of the Lusitania, while traveling upon the business of B. Held, error to hold that the death did not arise out of the employment.[48]

7. Applicant was employed as potman in the public house of defendant, and was cleaning a brass plate on the street side of the house, when he was knocked down and injured by the concussion incident to the exploding of a bomb dropped by German aircraft. He is held not entitled to compensation, as it was not shown that the applicant "was injured through a risk specially attendant upon his being on the street as distinguished from his being in any other place."[49]

8. The fingers of an employee's right hand were crushed, and fingers of the left hand were also injured, causing an infection of the left hand. Held, that it was proper to allow the statutory damages for partial but permanent injury to the fingers, and also for the temporary disability from the infection, as the two injuries, although the results of the same accident, were different in character.[50]

9. One employed as a gardener, laborer, and caretaker was alleged to have died as the result of ptomaine poisoning from sewer gas breathed while obeying an order of his employer to find and open certain cesspools, on which work he was engaged four or five days. Held, that his death is not due to an "accident arising out of or in the course of employment" within the meaning of the Workmen's Compensation Act of 1906 so as to entitle his widow to claim compensation thereunder, in the absence of proof indicating the exact time, circumstances, place, and cause of the accident, since such disease is not an "indus-

47—Venner v. New Dells Lumber Co., (1915) 161 Wis. 370, 154 N. W. 640, L. R. A. 1916 A 273. But notice restricted construction placed upon "accident" in State ex rel. Faribault Woolen Mills Co. v. District Court, (Minn. 1917) 164 N. W. 810, 15 N. C. C. A. 520, which refuses recovery for typhoid.

48—Foley v. Home Rubber Co., (N. J. 1917) 99 Atl. 624.

49—Allcock v. Rogers, (1918) 62 Sol. J. 421, aff'g [1918] W. C. & Ins. Rep. 80.

50—Nitram Co. v. Creagh, (1913) 84 N. J. Law 243, 86 Atl. 435, 3 N. C. C. A. 587 note.

trial disease" scheduled in the Act, concerning which the applicant is not required to present such proof.[51]

10. An engineer became fatally overheated while working in an engine room of a steamer in the Red Sea, the temperature in the room being 114° Fahrenheit. Held, that he died of accident arising out of and in the course of his employment.[52]

51—Eke v. Hart-Dyke, [1910] 2 K. B. 677, 3 N. C. C. A. 230.

52—Maskery v. Lancashire Shipping Co., Limited, [1914] W. C. & Ins. Rep. 290, 6 N. C. C. A. 708.

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